# SUSPENDING ENFORCEMENT OF JUDGMENTS DURING APPEAL

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## PURPOSE OF THE BOND, DEPOSIT, OR SECURITY

After the trial court renders a final judgment against a party, and after the expiration of the plenary power of the trial court, the judgment may be enforced by obtaining a judgment lien and/or through the tools for enforcement provided under Texas law, such as turnover orders, post-judgment discovery, execution on the judgment, garnishment, etc. 1 STATE BAR OF TEXAS, TEXAS APPELLATE PRACTICE MANUAL § 13.1 (2d ed. 1993). The filing of a supersedeas bond or one of the equivalents, such as a cash deposit, suspends the enforcement process and allows the parties to maintain the status quo during the pendency of the appeal. TEX. R. APP. P. 24.1(f); *BP Am. Prod. Co. v. Red Deer Res., LLC*, No. 07-14-00032-CV, 2014 Tex. App. LEXIS 7572, *5 2014 WL 3419496 (Tex. App.—Amarillo July 11, 2014, on motion); O'CONNOR'S TEXAS CIVIL APPEALS 166 (2013) [hereinafter O'Connor's]. The effect of a supersedeas bond is to stay enforcement of the judgment for the party appealing the judgment while at the same time providing some assurance to the party holding the judgment that the judgment will be satisfied at least to the extent of the bonded amount if the appeal is unsuccessful. *FaulknerUSA, LP v. Alaron Supply Co.*, 301 S.W.3d 345, 347 (Tex. App.—El Paso 2009, no pet.); *In re Marriage of Reinauer*, 07-99-00348-CV, 2000 WL 377837 (Tex. App.—Amarillo, April 10, 2000, no pet.); *Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 493 (Tex. App.—Texarkana 1998, pet. denied); *Butron v. Cantu*, 960 S.W.2d 91, 94 (Tex. App.—Corpus Christi 1997, no writ).

A supersedeas bond is "[a]n appellant's bond to stay execution on a judgment during the pendency of the appeal." BLACK'S LAW DICTIONARY 214 (10th ed. 2014); *see also id.* at 1667 (defining "supersedeas"). Literally, the filing of a valid bond "supersedes," or takes the place of the judgment. However, in truth, the filing of a supersedeas bond does not "suspend" the judgment; instead, it suspends the remedies for enforcement of the judgment. *Elliot v. Lester*, 126 S.W.2d 756, 758 (Tex. Civ. App.—Dallas 1939, no writ). In general, the mere perfection of an appeal does not itself stay execution of the judgment. *Robinson v. Lufkin Fed. Savs. & Loan Assoc.*, 09-96-00113-CV, 1997 WL 335171, *1, 1997 Tex. App. LEXIS 3249, *5 (Tex. App.—Beaumont June 19, 1997, pet. denied) (citing TEX. R. CIV. P. 627; TEX. R. APP. P. 47(a)); *but see* discussion *infra 2-8* (regarding exceptions).

Without a means of suspending the execution process, the judgment debtor is subject to having its property sold out from under it or otherwise having the judgment carried out. If the judgment debtor later wins the appeal, its ability to recover the proceeds of the sale of property (or reverse a performance) might likely be a hollow victory. Most execution-related sales rarely reach the true value of the lost property. And if the judgment is one requiring or allowing some kind of performance to occur, it is usually difficult to "undo" what has been done already. If a judgment creditor is not given financial assurance of payment in return for a stay of execution, the judgment debtor could potentially deplete its estate, leaving nothing valuable upon which to execute to satisfy the judgment after an unsuccessful appeal. A supersedeas bond interposes a

third-party to guarantee payment or performance if the judgment debtor fails to satisfy the judgment.

A supersedeas bond is not intended to, and does not, eliminate collection remedies available when a judgment becomes final. *Giles*, 982 S.W.2d at 492. The judgment creditor has the option of collecting against either the surety or the judgment debtor once the appeal is concluded. *Id.* (holding that supersedeas did not void a post-appeal turnover order). Enforcement of the bond can be accomplished through (a) amendment of the judgment to include the surety so that collection may be undertaken, (b) a breach of contract action brought against the surety, or (c) a motion made to the appellate court for judgment against the sureties on the bond. *Id.* n.21 (citing *Muniz v. Vasquez*, 797 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1990, no writ)).

## CONTRACTUAL NATURE OF THE BOND

"A supersedeas bond is a contract," and thus it is "construed as any other contract, and the cardinal rule of construction is to ascertain the intent of the parties." *Amwest Surety Ins. Co. v. Graham*, 949 S.W.2d 724, 726 (Tex. App.—San Antonio 1997, writ denied); *see also Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 492 (Tex. App.—Texarkana 1998, pet. denied). In short, the sureties are "no further bound than they have contracted to be. They are given the justice of a literal interpretation of the language of their undertaking." *Trent v. Rhomberg*, 18 S.W. 510, 512 (Tex. 1886). The bond is not for any judgment, but it is only for the particular judgment bonded. *Amwest*, 949 S.W.2d at 728. The bond is not itself property owned by the judgment debtor. *Giles*, 982 S.W.2d at 491. The bond is not an unconditional agreement to pay a stated sum of money. Instead, it imposes only a conditional or contingent liability. *Muniz v. Vasquez*, 797 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1990, no writ).

## EXEMPTIONS FROM SUPERSEDEAS REQUIREMENTS

The legislature has exempted certain judgment debtors from filing a bond. The courts liberally construe statutes exempting persons from filing bonds. *Herring v. Houston Nat. Exch. Bank*, 253 S.W.2d 813, 816 (Tex. 1923) (construing general governmental exemption); *Board of Adjustment of Fort Worth v. Stovall*, 216 S.W.2d 171, 174-75 (Tex. 1949) (construing incorporated cities exemption); *El Paso Cent. Appraisal Dist. v. Montrose Partners*, 754 S.W.2d 797, 799 (Tex. App.—El Paso 1988, writ denied) (construing tax code exemption); *but see In re State Bd. for Educator Certification*, 452 S.W.3d 802 (Tex. 2014). Although many of the statutes addressing this issue refer to the filing of bonds for costs, the courts interpret these statutes as including supersedeas bonds. *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481-82 (Tex. 1964); O'Connor's, *supra* 181-82.

When the legislature exempts a judgment debtor from filing security for appeal, the trial court has no discretion to require the judgment debtor to post security to supersede the judgment. *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998) (per curiam). Mandamus will issue in such a case. *Id.*

The discussion and listing below, while not an exhaustive listing of categories of exemptions, represents an extensive list of categories based upon

existing authority. A prospective appellant should consult the primary authority with respect to specific categories of persons, entities, and subject-matter involved to ascertain if there may be some additional ground for an exemption.

**1. The government, generally**

Many government officials and governmental entities are exempt from filing a supersedeas bond. The following governmental entities or officers are exempt from the requirement of filing a bond:

- the state
- a department of the state
- the head of a department of the state
- a county of the state
- the Federal Housing Administration
- the Federal National Mortgage Association
- the Government National Mortgage Association
- the Veterans' Administration
- the administrator of veterans affairs
- any national mortgage savings and loan insurance corporation created by an act of congress as a national relief organization that operates on a state-wide basis
- the FDIC in its capacity as receiver or in its corporate capacity

TEX. CIV. PRAC. & REM. CODE § 6.001; *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481-82 (Tex. 1964).

Included in this category of persons who are not required to file a bond to appeal is the district clerk, *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999); the prison commission and its individual members sued in their official capacities, *Herring v. Houston Nat. Exch. Bank*, 253 S.W.2d 813, 815-16 (Tex. 1923); the Texas Liquor Control Board and its administrator, *Ammex Warehouse*, 381 S.W.2d at 480-82; the state commissioner of insurance and banking and his special agent acting in his official capacity, *Collier v. Smith*, 169 S.W. 1108, 1109-10 (Tex. Civ. App.—Amarillo 1914, writ ref'd); *see Hall v. Eastland County*, 254 S.W. 1113, 1114 (Tex. Civ. App.—El Paso 1923, no writ); the Teacher Retirement System of Texas and its board of trustees, *Teacher Retirement Sys. v. Duckworth*, 260 S.W.2d 632, 633 (Tex. Civ. App.—Fort Worth 1953, *aff'd*, 264 S.W.2d 98 (Tex. 1954); the Texas Department of Human Resources, *Holder v. Holder*, 582 S.W.2d 598, 600 (Tex. Civ. App.—Texarkana 1979, no writ); the Railroad Commission and its members when sued in their official capacity, *Railroad Comm'n v. Roberts*, 332 S.W.2d 745, 749 (Tex. Civ. App.—Austin 1960, no writ); *Railroad Comm'n v. Vanway Express Co.*, 103 S.W.2d 814, 815 (Tex. Civ. App.—Beaumont 1937, writ ref'd); *Smith v. Texas Farm Prods.*, 86 S.W.2d 52, 54 (Tex. Civ. App.—Beaumont 1935), *aff'd on other grounds*, 96 S.W.2d 290 (Tex. 1936); the Public Utilities Commission, *Public Utils. Comm'n v. Coalition for Affordable Util. Rates*, 776 S.W.2d 221, 222 (Tex. App.—Austin 1989, no writ); the Texas banking commissioner, *Gossett v. L.G. Balfour Co.*, 111 S.W.2d 1119, 1121 (Tex. Civ. App.—Fort Worth 1937), *rev'd on other grounds*, 115 S.W.2d 595 (Tex. 1938); a county board or agency, *Dallas County Bail Bond Bd.*, 773 S.W.2d 586, 587 (Tex. App.—Dallas 1989, no writ); the state comptroller, *Lane v. Hewgley*, 155

S.W. 348, 350 (Tex. Civ. App.—San Antonio 1913, no writ); county judges and county commissioners sued in their official capacities, *Parker v. White*, 815 S.W.2d 893, 895 (Tex. App.—Tyler 1991, no writ); *Weber v. Walker*, 591 S.W.2d 559, 563 (Tex. Civ. App.—Dallas 1979, orig. proceeding); *Richardson v. Cameron County*, 275 S.W.2d 709, 710 (Tex. Civ. App.—San Antonio 1955, no writ); *but see Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1957, no writ); *Ploch v. Dickison*, 223 S.W.2d 568, 568 (Tex. Civ. App.—El Paso 1949, no writ); *Strength v. Black*, 241 S.W. 281, 282 (Tex. Civ. App.—Texarkana 1920, no writ); and the county treasurer and the county auditor, *Weber*, 591 S.W.2d at 563.

Although the statute's liberal construction ordinarily operates in favor of individuals sued in their official capacities, when the individual is suing or being sued in an individual capacity, the statute does not operate to exempt the individual from filing a bond. *City of Ranger v. Commission on Law Enforcement Officer Standards & Educ.*, 599 S.W.2d 693, 694 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

Section 6.001 of the Civil Practice and Remedies Code *does not* exempt the United States of America or other unnamed departments of the United States. *Southland Life Ins. Co. v. Barrett*, 172 S.W.2d 997, 1001 (Tex. Civ. App.—Fort Worth 1943, writ ref'd w.o.m.); *Thomas v. Cowan*, 153 S.W.2d 509, 509-10 (Tex. Civ. App.—Fort Worth 1941, no writ); *United States v. Branson*, 147 S.W.2d 286, 287 (Tex. Civ. App.—San Antonio 1941, writ ref'd). Notably, federal law exempts the U.S. government from giving bond in appeals taken in federal courts. 28 U.S.C. § 2408. However, the federal statute does not exempt the United States or any department thereof from filing a supersedeas bond in state court. *United States Dept. of Air Force v. Wilhelm*, 555 S.W.2d 498, 499 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Branson*, 147 S.W.2d at 287.

A number of other agencies, entities, and individuals do not fall within Section 6.001. In particular, Section 6.001 does not apply to appeals by other states. *Arkansas v. Sabo*, 559 S.W.2d 124, 126 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.). Section 6.001 also does not apply to appeals by the University Interscholastic League (UIL) or its officials. *University Interscholastic League v. Hardin-Jefferson I.S.D.*, 648 S.W.2d 770, 773 (Tex. App.—Beaumont 1983, no writ); *University Interscholastic League v. Payne*, 635 S.W.2d 754, 756-57, 758 (Tex. App.—Amarillo 1982, writ dism'd w.o.j.); *Marshall v. Brown*, 635 S.W.2d 578, 580 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.). Further, although it ordinarily applies to the state board of insurance and its commissioner, Section 6.001 does not operate to exempt the liquidator of an insurance company in receivership. *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671, 671-72 (Tex. App.—El Paso 1987, writ denied). Although acting with the Insurance Board's approval, the liquidator stands in the shoes of the insolvent insurance corporation. *Id.* at 671.

Notably, the right of a governmental subdivision or individual to automatic supersedeas is not absolute under Civil Practice and Remedies Code Section 6.001. *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 803 (Tex. 2014). The Texas Supreme Court has held that Appellate Rule

24.2(a)(3) gives a trial court discretion to refuse suspension of the judgment if the judgment creditor posts security. 452 S.W.3d at 809.

**2. Certain public servants**

Certain public servants who are sued because of conduct or omissions occurring in the course of their office or employment are exempt from filing a supersedeas bond if the suit is defended by the attorney general. TEX. CIV. PRAC. & REM. CODE § 104.006. Included in this class of persons are (1) an employee, a member of the governing board, or any other officer of a state agency, institution or department; (2) a former employee, former member of the governing board, or any other former officer of a state agency, institution, or department who was an employee when the act or omission on which the damages are based occurred; (3) a physician or psychiatrist licensed in Texas who was performing services under a contract with any state agency, institution, or department when the act or omission on which the damages are based occurred; (4) a racing official who was performing service under a contract with the Texas Racing Commission when the act or omission on which the damages are based occurred; (5) a phlebotomist licensed in this state who was performing services under a contract with the Texas Department of Criminal Justice when the act or omission on which the damages are based occurred; (6) a chaplain or spiritual advisor who was performing services under contract with the Texas Department of Criminal Justice, the Texas Youth Commission, or the Texas Juvenile Probation Commission when the act or omission on which the damages are based occurred; (7) a person serving on the governing board of a foundation, corporation, or association at the request and on behalf of an institution of higher education, not including a public junior college; (8) a state contractor who signed a waste manifest as required by a state contract; (7) the estate of any of the aforementioned individuals. *Id.* § 104.001.

**3. Local governments and subdivisions**

**a. Incorporated cities and home-rule municipalities**

A municipality is not required to post a supersedeas bond to appeal from a judgment. TEX. CIV. PRAC. & REM. CODE § 6.002; *Board of Adjustment of Fort Worth v. Stovall*, 216 S.W.2d 171, 174-75 (Tex. 1949); *City of Wink v. R.B. George Machinery Co.*, 63 S.W.2d 849, 849 (Tex. 1933) (per curiam); *City of Athens v. Evans*, 63 S.W.2d 379, 381-82 (Tex. Comm'n App. 1933, judgm't adopted); *Harding v. City of Raymondville*, 58 S.W.2d 55, 56 (Tex. Comm'n App. 1933, judgm't adopted); *Greanias v. City of Houston*, 841 S.W.2d 411, 413 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding); *City of San Antonio v. Clark*, 554 S.W.2d 732, 733 (Tex. Civ. App.—San Antonio 1977, no writ). City officials of municipalities are exempt from filing supersedeas bonds when the city official is sued in his or her official capacity. *See Greanias*, 841 S.W.2d at 413.

Agencies created by incorporated cities are also exempt from filing supersedeas bonds. *Stovall*, 216 S.W.2d at 174-75; *Board of Trustees of Eagle Pass Water Works Sys. v. Deer Run Props., Inc.*, 616 S.W.2d 337, 340 (Tex. Civ. App.—San Antonio 1981, no writ). Likewise, the members of such boards and agencies are exempt for filing supersedeas bonds. *Board of Trustees of Eagle Pass Water Works*, 616 S.W.2d at 340.

**b. Hospital district appeals of condemnation proceedings**

Some county hospital districts with the power of eminent domain are exempt from supersedeas bond requirements on appeal from a condemnation proceeding. For example, certain county hospital districts are exempt from filing a supersedeas bond in an appeal from a condemnation proceeding brought by the hospital district. TEX. HEALTH & SAFETY CODE §§ 281.054(c), 283.050(c), 286.080(c); *cf.* TEX. PROP. CODE § 21.063(b) (*appellate court* may not suspend trial court judgment during appeal of condemnation judgment).

**c. Civic center authorities**

Civic center authorities are exempt from filing a supersedeas bond. TEX. LOC. GOV'T CODE § 281.053. Civic center authorities may be established by municipalities for purposes related to construction and operation of civic centers, opera houses, music halls, and other similar public facilities. *See id.* § 281.044.

**d. Regional transportation authorities and road districts**

A regional transportation authority is exempt from posting security for supersedeas. TEX. TRANSP. CODE § 452.054(b); *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998) (per curiam).

Road districts are exempt from posting security for a supersedeas bond because they are related to counties. *Denton County v. Sauls*, 265 S.W. 1091, 1093 (Tex. Civ. App.—Austin 1924, no writ); *see also* TEX. TRANSP. CODE § 257.001(a) (road districts may sue or be sued like a county).

**e. Water districts**

The following water districts are exempt from appeal bond requirements:

- a water improvement district
- a water control and improvement district
- an irrigation district
- a conservation and reclamation district
- a water control preservation district organized under state law
- a levee improvement district organized under state law
- a drainage district organized under state law
- an entity created under Section 52, Article III (districts created to issue bonds and levy and collect taxes for certain specified purposes), or Section 59, Article XVI (reclamation and conservation districts), Texas Constitution

TEX. CIV. PRAC. & REM. CODE § 6.003; *City & County of Dallas Levee Imp. Dist. v. Carroll*, 263 S.W.2d 307, 308 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.) (water control and improvement district). In addition, a water district or water supply corporation is exempt from filing a supersedeas bond in an appeal from a condemnation proceeding. TEX. WATER CODE § 49.222(b).

**f. Tax decisions**

A supersedeas bond need not be filed by the chief appraiser, the county, the comptroller, or the commissioner's court in an appeal taken under the Property Tax Code. TEX. TAX CODE § 42.28. An appraisal district created by a county for purposes of ad valorem taxation is a governmental agent of the county and is exempt from filing a bond.

*Dallas County App. Dist. v. Institute for Aerobics Research*, 751 S.W.2d 860, 861 (Tex. 1988); *Dallas County App. Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.—Dallas 1994, writ denied); *but see Plano I.S.D. v. Oake*, 682 S.W.2d 359, 361 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985) (holding that Collin County Central Appraisal District not subject to Section 42.28 because appeal did not originate under Chapter 42). Likewise, the appraisal review board is exempt from filing a bond. *El Paso Cent. App. Dist. v. Montrose Partners*, 754 S.W.2d 797, 798, 799 (Tex. App.—El Paso 1988, writ denied).

Section 42.28 does not relieve taxing units, such as school districts, from the requirement of filing a supersedeas bond. *Wilson v. Thompson*, 348 S.W.2d 17, 17-19 (Tex. 1961) (per curiam); *Grand Prairie I.S.D. v. Southern Parts Imports, Inc.*, 803 S.W.2d 762, 763 (Tex. App.—Dallas 1991), *aff'd*, 813 S.W.2d 499 (Tex. 1991) (per curiam); *Arnold v. Crockett I.S.D.*, 688 S.W.2d 884, 885-86 (Tex. App.—Tyler 1985, no writ); *Plano I.S.D. v. Oake*, 682 S.W.2d 359, 361 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985); *Arnold v. Crockett I.S.D.*, 688 S.W.2d 884, 885-86 (Tex. App.—Tyler 1985, no writ); *Marshall v. Brown*, 635 S.W.2d 578, 581 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.); *but see Amarillo I.S.D. v. Brockmeyer*, 292 S.W.2d 886, 886-87 (Tex. Civ. App.—Amarillo 1956, no writ) (holding that public schools need not file appeal bond because they are conducted for benefit of entire state by a governmental agency); *see also* TEX. TAX CODE § 1.04(12) (defining "taxing unit"). Notably, if the case is one brought by the taxing unit to collect delinquent taxes, an appeal bond for court costs is not required. *Arnold v. Crockett I.S.D.*, 688 S.W.2d 884, 885 (Tex. App.—Tyler 1985, no writ); *Brady I.S.D. v. Davenport*, 663 S.W.2d 637, 639 (Tex. App.—Austin 1983, no writ); *see* TEX. TAX CODE § 33.49 (exempting taxing units from liability for court costs); *Nacogdoches I.S.D. v. McKinney*, 513 S.W.2d 5, 5 (Tex. 1974) (per curiam) (holding that school districts are exempt from payment of court costs). However, if the suit is initiated by the taxpayer for injunctive relief or if it is a suit merely related to the collection of delinquent taxes, it appears that an appeal bond for court costs is required. *See Grand Prairie I.S.D. v. Southern Parts Imports, Inc.*, 803 S.W.2d 762, 763 (Tex. App.—Dallas 1991), *aff'd*, 813 S.W.2d 499 (Tex. 1991) (per curiam) (suit against taxpayer for fraudulent conveyance holding that exception applies in narrow circumstance in which school district is making claim for unpaid taxes); *Plano I.S.D. v. Oake*, 682 S.W.2d 359, 361 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985) (holding that taxpayer-initiated suit to enjoin collection of taxes is not a delinquent tax suit); *Fort Bend I.S.D. v. Weiss*, 570 S.W.2d 241, 242-43 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

**g. Local governments and employees of local governments**

Employees of local governments sued for tort liability are exempt from supersedeas requirements. TEX. CIV. PRAC. & REM. CODE § 102.005. A "local government" includes a county, city, town, special purpose district, a soil and water conservation district, and any other political subdivision of the state. TEX. CIV. PRAC. & REM. CODE § 102.001(2).

### 4. Subject-matter exemptions

#### a. Labor disputes

In cases involving employment disputes before the Texas Employment Commission, any person appealing from the decision of the trial court is exempt from filing a supersedeas bond. TEX. LAB. CODE § 212.210.

#### b. Executors and administrators

Executors and administrators of estates are not required to file a bond to appeal unless the appeal concerns him or her personally. TEX. EST. CODE § 351.002; *Vineyard v. Irvin*, 855 S.W.2d 208, 212 (Tex. App.—Corpus Christi 1993, orig. proceeding). Similarly, guardians are not required to file a bond to appeal unless the appeal concerns him personally. TEX. EST. CODE § 1152.002; *Inman v. Texas Land & Mortgage Co.*, 74 S.W.2d 124, 125 (Tex. Civ. App.—Amarillo 1934, no writ); *Wallace v. Adams*, 243 S.W. 572, 574 (Tex. Civ. App.—Texarkana 1922, writ dism'd).

#### c. Divorce proceedings awarding property

In divorce proceedings, the state has exempted parties from the necessity of filing a bond insofar as the judgment relates to the award of property. Section 9.007(c) of the Texas Family Code suspends the power of the court to enforce the property awards:

> The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending.

TEX. FAM. CODE § 9.007(c).

#### d. Election contests

In election contests, the filing of the notice of appeal suspends the execution of the trial court's judgment pending disposition of the appeal. TEX. ELEC. CODE § 232.016. Thus, the trial court is precluded from carrying out the judgment during appeal.

## TIMING — WHEN TO FILE SECURITY

The rules of procedure do not *require* a judgment debtor to file a bond, deposit, or other security at all, or at any particular time. However, the timing of the filing of the security is dictated by the rules relating to the judgment creditor's right of execution on the judgment. The time for execution on a judgment, and hence the deadline for suspending execution on the judgment, begins to run when the trial court signs a final and appealable judgment. *Hood v. Amarillo Nat'l Bank*, 815 S.W.2d 545, 548 (Tex. 1991); *see* O'Connor's, *supra* 173.

To avoid a possible writ of garnishment, the judgment debtor should file the security to suspend execution on the judgment immediately after the judgment is rendered. In some cases, such as a garnishment proceeding, a plaintiff may obtain a writ of garnishment immediately after the judgment is signed unless a proper supersedeas bond is filed. TEX. R. CIV. P. 657; *see* TEX. CIV. PRAC. & REM. CODE § 63.001(3); Sarah B. Duncan, *Supersedeas and Enforcement of Judgments*, *in* STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE COURSE L-19 (1990) [hereinafter Duncan]; W. Wendell Hall, *Suspension of Enforcement of Judgments in State and Federal Court*, *in* ADVANCED CIVIL APPELLATE PRACTICE COURSE T-25 (1999) [hereinafter Hall]. However, the trial court may not render judgment in the garnishment proceeding until the underlying judgment is no longer subject to being set aside or reversed on appeal.

Duncan, *supra* L-19. In addition to a writ of garnishment, in some cases, a turnover order may be issued immediately after the judgment is signed. Duncan, *supra* L-26; Hall, *supra* T-25.

The judgment debtor may wish to supersede the judgment at once to stave off post-judgment discovery. Post-judgment discovery may be served immediately after the rendition of judgment. TEX. R. CIV. P. 621a; Duncan, *supra* L-6. The filing of proper security to suspend execution on the judgment suspends further discovery. TEX. R. CIV. P. 621a; *but see* TEX. R. APP. P. 24.2(c)(2); *see also* discussion *infra* 31 (regarding reasonable discovery in limited circumstances).

Other post-judgment collection procedures are not available until later. For example, the judgment creditor may request the clerk to issue execution upon the judgment 30 days after the judgment is signed, or if a motion for new trial or motion to modify is filed, 30 days after the motion is overruled. TEX. R. CIV. P. 627; Duncan, *supra* L-9-10. Often judgment creditors and their attorneys do not take action to collect on the judgment until the expiration of these deadlines; however, a prudent judgment debtor would be well-served to file the supersedeas bond at once, or, if possible, to reach an agreement with the judgment creditor to temporarily suspend collection efforts until proper security can be filed.

The judgment debtor may also desire to supersede the judgment as soon as possible to prevent a judgment creditor from acquiring a lien on property owned by the judgment debtor or acquired at a later date. *See* TEX. PROP. CODE § 52.001. However, if the judgment creditor properly abstracts the judgment and records it, the lien will nonetheless be effective even if the judgment is superseded unless the judgment debtor complies with Section 52.0011 of the Texas Property Code. The abstract will not constitute a lien on the real property if (1) the defendant has posted proper security, and (2) the trial court finds that creation of a lien would not substantially increase the degree to which the 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. *Id.* § 52.0011. A certified copy of the court's finding must be recorded in the real property records in each county in which the abstracted judgment or certified copy of the judgment has been filed. *Id.*

One problem not addressed by the rules is the circumstance in which a judgment is rendered that requires the judgment debtor to file a motion with the trial court to ask the trial court to fix or reduce the amount of the judgment. In the case of a judgment for property, for example, the trial court must necessarily determine the amount of the bond to file. TEX. R. APP. P. 24.2(a)(2); *see* discussion *infra* 14-18 (regarding amount of bond, deposit or security). Due process concerns arise if the judgment creditor is permitted to secure a turnover order or other similar relief in the time between the date of the judgment and the date a hearing can be obtained on a motion to determine the amount of security for an appeal.

## METHODS OF SUSPENDING ENFORCEMENT

Appellate Rule 24.1 establishes four methods by which a judgment debtor may supersede a judgment. These methods include (1) a private, written contract with the judgment creditor, (2) a

bond, (3) a deposit in lieu of bond, and (4) alternate security ordered by the trial court. Any of these methods is acceptable to supersede a judgment unless otherwise provided by law. TEX. R. APP. P. 24.1(a).

**1. Private agreement (TRAP 24.1(a)(1))**

The judgment debtor and the judgment creditor may agree between themselves to suspend enforcement of the judgment during the pendency of an appeal. TEX. R. APP. P. 24.1(a)(1). Any such agreement must be written and filed with the court clerk. *Id.* That such a provision was included in the rules should be no surprise since the courts have held that a supersedeas bond is itself a contract. *See Carter Real Estate & Dev., Inc. v. Builder's Serv. Co.*, 718 S.W.2d 828, 830 (Tex. App.—Austin 1986, no writ); *see* discussion *supra* 1. The form of this private agreement is not dictated by the rules, and the trial court holds no power of approval or disapproval.

Because the appellate rules do not require the trial court's approval of such a privately-negotiated agreement, the right to make a private agreement opens a world of possibilities for the parties, limited only by the imagination of counsel. Nonetheless, the right to suspend enforcement of a judgment by private agreement is often unexplored and untapped.

Private supersedeas agreements are seldom used for a number of reasons. Among these reasons are the following:

- the judgment creditor believes the judgment debtor may have difficulty posting a bond, and feels that requiring the judgment debtor to post a bond for appeal will keep pressure on and force a settlement
- the judgment creditor does not want to agree to something that will ensure a protracted appeal and delay collection of the judgment for months or years, or even forever if the judgment is reversed
- the judgment creditor hopes to drive a wedge between an insured judgment debtor and the insurer when there are coverage issues at stake, in an effort to force a settlement deal with the insured judgment debtor and get an assignment against of claims against the insurer
- the judgment debtor fundamentally objects to giving the judgment creditor any money, even if to avoid paying the premium for a supersedeas bond
- the financial stability of the judgment debtor is in question, or insurance coverage issues regarding the judgment exist, and a private agreement might not adequately protect the judgment creditor
- counsel for the judgment creditor is fearful that recommending such a private agreement will create malpractice problems if the judgment later becomes uncollectible
- counsel for the judgment creditor is fearful that a private agreement might result in subsequent collateral, protracted litigation over the meaning and interpretation of the private agreement
- the judgment creditor and judgment debtor and their counsel have developed so much

animosity toward one another that agreement on any matter is unlikely

These factors represent legitimate concerns and obstacles; however, often the obstacles *are* surmountable, and, often, the concerns of one party stem from a lack of information or misconception. Certainly, strong reasons and incentives favor making a private agreement, and counsel for both parties owe it to their clients to at least consider a private security agreement.

Information and communication are important keys to overcoming the obstacles to reaching a private supersedeas agreement. If the judgment creditor is concerned about the financial stability/viability of the judgment debtor, a pledge of assets, or a pledge by the judgment debtor's insurer as a surety might satisfy the judgment creditor. If the judgment creditor is concerned with coverage issues, the judgment debtor and his insurer might consider a separate agreement to resolve those issues at that time or by separate suit. In addition, the judgment debtor and his insurer might jointly agree to pay the judgment and indemnify the judgment creditor for any attorney's fees incurred as a result of any need to resolve a coverage question through litigation. In this manner, the insurer becomes a surety when the law might otherwise require a different surety. *See* discussion *infra* 24 (regarding who may be sureties).

If the judgment creditor's refusal to agree to a private supersedeas stems from a desire to prevent an appeal or to force a settlement, the judgment debtor should clearly communicate (1) his intent to appeal, and (2) his ability to post bond, even if an agreement cannot be reached. In this way, the judgment creditor should be made to understand that the refusal to agree will not prevent the appeal from going forward.

If the judgment debtor has a fundamental objection to, or policy against, payment of *any* money to the judgment creditor, it may be difficult for the parties to reach agreement. However, in this circumstance, the judgment creditor might simply need to ask for a lower cash amount up front.

If the judgment creditor's counsel has concerns about malpractice exposure to his client if the judgment is later uncollectible, the judgment debtor should provide clear evidence and assurances that the private supersedeas will not impact the collectability of the judgment. Further, the judgment creditor's counsel should keep his client fully informed of the risks and benefits of the private agreement and have the client sign the agreement.

Concerns that a private supersedeas agreement might result in subsequent litigation about the meaning and intent of the agreement may be resolved by careful drafting. Further, the agreement could provide for indemnification of attorney's fees in the event subsequent litigation is necessary.

Finally, if the problem is one of animosity between the parties and/or their counsel, involving an appellate mediator in the matter might facilitate discussions. Further, the fresh face of appellate counsel might help to get the flow of communication going again.

A private supersedeas agreement may have advantages to both parties to the judgment, and should be explored. For example, if the judgment is substantial in amount, the premium on a bond may be quite high. The parties to the judgment could agree that the judgment debtor pay to the judgment

creditor some amount below the premium on a bond in exchange for the judgment creditor's agreement not to execute on the judgment. In this instance, the judgment debtor saves a portion of the premium and the judgment creditor gets some cash up front to help pay off some of the costs of trial or to fund further efforts to uphold the judgment. If the judgment is reversed and rendered on appeal, at least the judgment creditor has not come away completely empty-handed.

Another viable option the parties might consider is a high/low agreement in exchange for an agreement not to execute. This arrangement might be appropriate in a case in which it is apparent that at least a portion of the award in the judgment is unassailable, while other portions of the judgment may be vulnerable on appeal, and might result in a remand. Under this scenario, the parties might agree that the judgment debtor (and his insurer) pay a certain minimum sum even if the case is reversed and remanded, and pay another, larger sum if certain rulings or findings of the trial court are upheld on appeal. As further consideration, the judgment debtor might agree to pay some of the money in advance in exchange for the judgment creditor's agreement not to execute on the judgment.

**2. Good and sufficient bond (TRAP 24.1(a)(2))**

The most common method of suspending execution on a judgment is the supersedeas bond. Appellate Rule 24.1 provides that a judgment debtor may supersede the judgment by "filing with the trial court clerk a good and sufficient bond." TEX. R. APP. P. 24.1(a)(2). Rule 24.1 does not describe when a bond is "good and sufficient." Presumably this requirement is a reference to the remaining portions of Appellate Rule 24.1, which dictate the amount of the bond and the form of the bond. The form and amount of the bond are discussed in detail below. *See* discussion *infra* 14-18.

**3. Deposit in lieu of bond (TRAP 24.1(a)(3))**

In lieu of filing a bond, a judgment debtor has the option of filing a deposit with the trial court clerk for the same amount that would be required if a bond were filed. Appellate Rule 24.1 provides that a judgment debtor may supersede the judgment by "making a deposit with the trial court clerk in lieu of a bond" TEX. R. APP. P. 24.1(a)(3). Appellate Rule 24.1(c) describes the types of deposits that are acceptable, the amount of the deposit, and the clerk's duties with respect to the deposit.

Three types of deposits are acceptable. Appellate Rule 24.1 and Civil Procedure Rule 14c permit the filing of (1) cash, (2) a cashier's check drawn on a federally insured and federal-chartered or state-chartered bank or savings-and-loan association; or (3) upon leave of court, a negotiable obligation of the federal government or of any federally insured and federal-chartered or state-chartered bank or savings-and-loan association. TEX. R. APP. P. 24.1(c)(1); TEX. R. CIV. P. 14c. The actual negotiable instrument must be filed with the clerk, rather than a receipt for such an instrument. *Mercantile Bank & Trust v. Cunov*, 733 S.W.2d 717, 718 (Tex. App.—San Antonio 1987, no writ). A letter of credit does not qualify as a proper negotiable obligation under these provisions governing deposits in lieu of bond. *Heritage Housing Corp. v. Ferguson*, 651 S.W.2d 272, 273 (Tex. App.—Dallas 1983, no writ) (per curiam); *but see* discussion *infra* subsec.

4, below (regarding alternate security). A certificate of deposit may, however, qualify as a proper negotiable obligation under these provisions. *Southwestern States Gen. Corp. v. McKenzie*, 658 S.W.2d 850, 852 (Tex. App.—Dallas 1983, writ dism'd w.o.j.)

In calculating the amount of the deposit, the judgment debtor should use the same formula set out in the rules for calculating the amount of a bond. TEX. R. APP. P. 24.1(c)(2). The calculation of this amount is discussed in detail below. *See* discussion *infra* 14-18. For purposes of this discussion of the deposit in lieu of bond, it should be noted that judgment debtors seldom make use of this method of suspending enforcement of a judgment. The reason the deposit in lieu of bond is seldom used stems from economic issues. In many cases, the judgment debtor does not have the kind of liquid assets available to post the deposit. Even in those cases in which the judgment debtor does have sufficient liquid assets, it rarely makes economic sense to tie up the money in a non-interest bearing account or a low-interest bearing account for months or even years. In other cases, the judgment debtor is insured and the insurer can obtain a bond at discounted rates, perhaps from another, related insurance company.

In the case of the deposit of cash or a cashier's check, the clerk is required to "promptly" deposit the money "in accordance with law." TEX. R. APP. P. 24.1(c)(3). Deposits with the court are governed by Chapter 117 of the Texas Local Government Code. *See* TEX. LOC. GOV'T CODE Ch. 117.

The clerk is required to hold the deposit until such time as the conditions of liability set out in Rule 24.1(d) regarding the form of supersedeas bonds are satisfied. TEX. R. APP. P. 24.1(3); *see* discussion *infra* 32 (regarding concluding the appeal).

**4. Alternate security (TRAP 24.1(a)(4))**

The appellate rules provide for suspending execution on a judgment by "alternate" means. Appellate Rule 24.1 allows a judgment debtor to supersede the judgment by "providing alternate security ordered by the court." TEX. R. APP. P. 24.1(a)(4). Prior to 1988, the trial court could not allow alternate security in appeals from money judgments. *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 605 (Tex. 1996). Old Appellate Rule 47 was amended in 1988, in response to the perceived need for alternate security in appeals. *Isern*, 925 S.W.2d at 605; *see also* Ernest E. Figari, Jr., et al., *Texas Civil Procedure*, 42 SW. L.J. 523, 556 (1988); discussion *infra* 20-23 (regarding reducing bond amount). The amendment permitted the filing of alternate security, and allowed alternate security as to both the type *and* amount of security in question.

The current subparagraph (a)(4) of Appellate Rule 24.1 applies to the *type* of security rather than the *amount* of security. Appellate Rule 24.2(b) and Section 52.002 of the Civil Practice and Remedies Code apply to a trial court's order establishing an alternate, lesser *amount* of security. *See* TEX. R. APP. P. 24.2(b); TEX. CIV. PRAC. & REM. CODE § 52.002; discussion *infra* 20-23.

While subparagraph (a)(3), involving deposits in lieu of bond, does not permit the filing of non-negotiable instruments, such as letters of credit, subparagraph (a)(4) is broad enough to permit the filing of a letter of credit. Regardless of the *type* of alternate security used, the trial court's order of

alternate security should ensure that the judgment creditor is adequately protected during the pendency of the appeal. *See* TEX. R. APP. P. 24.1(e).

**FORM OF THE BOND (TRAP 24.1(b))**

A bond must conform with certain specified requirements of form and amount before the trial court clerk will approve it, and before it will operate to suspend enforcement of the judgment. A bond must be in the amount required by Appellate Rule 24.2. The calculation of the amount is discussed below. *See* discussion *infra* 14-18. With respect to the form of the bond, the bond must be (1) payable to the judgment creditor, (2) signed by the judgment debtor or the debtor's agent, (3) signed by a sufficient surety or sureties as obligors, and (4) properly conditioned. TEX. R. APP. P. 24.1(b)(1).

The trial court clerk may refuse to approve a bond that fails to recite that it is payable to the judgment creditor. If such a bond is approved, it is subject to challenge. *See Mercantile Bank & Trust v. Cunov*, 733 S.W.2d 717, 718 (Tex. App.—San Antonio 1987, no writ).

The bond must be signed by the judgment debtor or the judgment debtor's agent. In the case of a corporate judgment debtor, the bond should be signed by a principal of the corporation or by an authorized representative of the corporation.

The surety requirement in particular is key to providing the judgment creditor with security during the pendency of an appeal. The bond must be signed by a "sufficient" surety or sureties as obligors. *See* discussion *infra* 24 (regarding sufficient sureties). In short, the surety binds itself equally with the judgment debtor to be liable in the event the judgment is affirmed and the judgment debtor fails to perform the judgment.

Whether the surety is "sufficient" is critical. At one time, some district court clerks maintained a list of companies the clerk considered "sufficient" as sureties. Before selecting a surety or, once the surety is selected, and before obtaining the signature of the surety, counsel might be wise to confer with the trial court clerk to determine if the particular surety is acceptable.

A bond must contain appropriate conditioning language by which the surety or sureties subject themselves to liability for all damages and costs that may be awarded against the judgment debtor up to the amount of the bond. More specifically, the surety or sureties bind themselves to liability for all damages and costs, 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. TEX. R. APP. P. 24.1(d). The trial court clerk may refuse to approve the bond if it fails to include this conditioning language, or the trial court may sustain a challenge to the bond if it fails to include this language.

**AMOUNT OF THE BOND, DEPOSIT, OR SECURITY (TRAP 24.2)**

**1. Judgment for money**

If the judgment is one for recovery of money only, the amount of the bond, deposit or security must equal the sum of (1) compensatory damages

awarded in the judgment, (2) post-judgment interest for the estimated duration of the appeal, and (3) court costs awarded in the judgment. TEX. R. APP. P. 24.2(a)(1); *McDill Columbus Corp. v. University Woods Apts., Inc.*, 7 S.W.3d 923, 924 (Tex. App.—Texarkana 2000, n.p.h.). However, the amount of the bond must not exceed the lesser of (1) 50% of the judgment debtor's current net worth; or (2) 25 million dollars. TEX. R. APP. P. 24.2(a)(1).

Fortunately, many recent court opinions have helped to amplify what is encompassed within the terms "compensatory damages" and the "judgment debtor's net worth." Decisions addressing these key terms are discussed below.

**a. Compensatory damages**

Care should be taken to evaluate the elements of money awards included in a judgment to assess whether the particular award qualifies as "compensatory damages." "Compensatory damages" include amounts intended to compensate for actual losses sustained. *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 171-72 (Tex. 2013). The phrase generally *does not* include attorney's fees. *Id.* at 172; *In re Corral-Lerma*, 451 S.W.3d 385, 387 (Tex. 2014). However, if attorney's fees are awarded as an element of damages, such as when an attorney sues his client to recover fees owed, such fees would constitute compensatory damages. *In re Nalle Plastics*, 40 S.W.3d at 175. Disgorgement is an equitable forfeiture of benefits wrongfully obtained and such relief does not qualify as "compensatory damages." *In re Longview Energy Co.*, 464 S.W.3d 353, -- (Tex. 2015).

The courts of appeals have disagreed as to whether the amount to be superseded must include amounts awarded and due in future installments. *Compare Beavers v. Beavers*, 651 S.W.2d 52, 54-55 (Tex. App.—Dallas 1983, no writ); *with In re Marriage of Reinauer*, 2000 WL 377837, *2-3 (Tex. App.—Amarillo Apr. 10, 2000, n.p.h.) (unpublished) (distinguishing *Beavers* and holding that award of right to proration of future payments was not part of amount to be superseded). However, the bonded amount need not include damages that have not been finally determined or speculative damages. *See Edlund v. Bounds*, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied); *Hughes v. Habitat Apartments*, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992, no writ); *Culbertson v. Brodsky*, 775 S.W.2d 451, 454 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.). And certainly, no post-judgment interest would be included as to amounts that are contingent or not yet due and owing. *Cf. Ventling v. Johnson*, 58 Tex. Sup. Ct. J. 892, 902 (May 8, 2015).

**b. Post-judgment interest**

In the case of a judgment for money, the bond, deposit, or security must include "interest for the estimated duration of the appeal." TEX. R. APP. P. 24.2(a)(1); *see Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co.*, 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ); *National Convenience Stores, Inc. v. Martinez*, 763 S.W.2d 960, 960 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Cooper v. Bowser*, 583 S.W.2d 805, 806-07 (Tex. Civ. App.—San Antonio 1979, no writ). Depending on which court of appeals district the appeal is filed in, interest on the judgment for a one-year period is often sufficient. If the judgment debtor includes only one year

of interest in the amount of the bond, and more than a year passes without the appeal being resolved, the judgment creditor may force the judgment debtor to amend the bond to add additional interest. *See Kennesaw Life & Accident Ins. Co. v. Streetman*, 644 S.W.2d 915, 916-17 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Including interest for a period of two years may avoid the need to amend the amount of the bond, in the event the appeal takes longer than a year. Further, the additional premium cost on an additional year's worth of interest may be nominal and may be refundable in the event the appeal concludes earlier. Moreover, by including interest for a period of two years, the judgment debtor may avoid a challenge to the amount of the bond by the judgment creditor, as well as the attorney's fees necessarily incurred as a result of the challenge.

**c. Court costs**

The amount of the bond should include an amount for court costs. TEX. R. APP. P. 24.2(a)(1); *Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co.*, 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ). Generally, "court costs" refers to the fees or compensation fixed by law collectible by the officers of court, witnesses, and such like items, and does not ordinarily include attorney's fees which are recoverable only by virtue of contract or statute. *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172 (Tex. 2013).

Often, the amount of court costs is unknown at the time the bond must be prepared and filed. Some courts will provide a print-out of court costs that may be used to calculate court costs. Appellate counsel may wish to consult with trial counsel to get an idea of the amount of court costs. Sometimes, a rough estimate of the amount of court costs is all that is available. To avoid a potential challenge to the bond, deposit or other security, the judgment debtor would be wise to overestimate the amount of court costs for inclusion in the bond, deposit or security.

**d. Net worth**

A judgment debtor who uses a net worth affidavit must state his net worth with "complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained." TEX. R. APP. P. 24.2(c)(1); *Payson Petro., Inc. v. Wheeler*, No. 05-14-00852-CV, 2015 Tex. App. LEXIS 6599, *2 (Tex. App.—Dallas June 26, 2015, on motion). An affidavit that meets these requirements is prima facie evidence of the debtor's net worth for purposes of establishing the amount of the bond or deposit required to suspend enforcement of the judgment. TEX. R. APP. P. 24.2(c)(1). A trial court clerk must receive and file a net-worth affidavit tendered for filing. *Id.*

After the judgment debtor files an affidavit of net worth, the judgment creditor may file a contest to the affidavit and may conduct reasonable discovery concerning the judgment debtor's net worth. TEX. R. APP. P. 24.2(c)(2); *Payson Petro.*, 2015 Tex. App. LEXIS 6599, at *2. The trial court must hear a judgment creditor's contest to an affidavit of net worth promptly after any discovery has been completed. TEX. R. APP. P. 24.2(c)(3).

At the hearing on the contest to the affidavit of net worth, the judgment debtor has the burden of proving net worth. TEX. R. APP. P. 24.2(c)(3); *Payson Petro.*, 2015 Tex. App. Lexis 6599, at *2. The trial court is required to issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. *Business*

*Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 186 (Tex. App.—El Paso 2012, on motion). If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for 20 days to allow the judgment debtor to comply or to challenge the order in the court of appeals. *See* TEX. R. APP. P. 24.2(c)(3).

The calculation of "net worth" may not always be self-evident, in part because neither the legislature nor the Texas Supreme Court (by rule) has defined "net worth" for purposes of supersedeas. In general, the appellate courts have adopted the Generally Accepted Accounting Principles' (GAAP) definition of "net worth," which is the difference between total assets and total liabilities. *See, e.g., Payson Petro., Inc. v. Wheeler,* No. 05-14-00852-CV, 2015 Tex. App. LEXIS 6599, *2-3 (Tex. App.—Dallas June 26, 2015, on motion); *Newsome v. North Texas Neuro-Science Center*, No. 08-09-00025-CV, 2009 Tex. App. Lexis 8628, *9, 2009 WL 3738504 (Tex. App.—El Paso Nov. 9, 2009, on motion); *Enviropower, L.L.C. v. Bear, Stearns & Co.*, 265 S.W.3d 1, 5 (Tex. App.—Houston [1st Dist.] 2008, on motion) (en banc); *G.M. Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, on motion); *see also In re Jacobs*, 300 S.W.3d 35, 46 n.11 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding). It is unclear whether some other method of calculating net worth might be acceptable. However, appellate courts have rejected other proposed evidence or measures of net worth, including tax returns, *LMC Complete Auto, Inc. v. Burke*, 229 S.W.3d 469, 486 (Tex. App.—Houston [1st Dist.] 2007, no pet.); projected revenues, *Enviropower*, 265 S.W.3d at 4; market value or market capitalization, *Id.* at 4 & 6 n.4; *see Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 912, 914 (Tex. App.—Houston [14th Dist.] 2005, on motion); and a debtor's ability to make payroll as evidence that the debtor is not insolvent. *See LMC Complete Auto*, 229 S.W.3d at 485-86 (rejecting trial court's contrary conclusion).

Expert testimony may be required at a hearing on a motion contesting a net worth affidavit to assist with categorizing certain transactions as assets or liabilities. For example, it is sometimes difficult to determine whether to treat a debt from a loan as a liability or the proceeds thereof as an asset. One court held that loan proceeds should not be added back into the net worth equation as assets. In *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 314 (Tex. App.—El Paso 2009, on motion), the judgment creditor argued that application of the loan proceeds constituted a fraudulent conveyance. Without commenting on the propriety of the fraudulent conveyance argument, the court of appeals concluded that there was legally insufficient evidence of a fraudulent transfer and therefore the trial court abused its discretion in treating the paid-out loan proceeds as an asset.

Some appellate courts have concluded that the judgment itself should not be treated as a liability in the net worth determination. *See, e.g., Anderton v. Cawley*, 326 S.W.3d 725, 726 (Tex. App.—Dallas 2010, on motion); *Business Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 187 (Tex. App.—El Paso 2012, on motion). But in an earlier opinion, the El Paso Court of Appeals left open the possibility that a judgment might be included as a liability if expert testimony or case law supported

doing so. *Montelongo v. Exit Stage Left, Inc.*, 293 S.W.3d 294, 299 (Tex. App.—El Paso 2009, on motion).

One court held that it was not an abuse of discretion for the trial court to have included the judgment debtor's homestead as an asset. *Montelongo*, 293 S.W.3d at 299. However, the court noted that if the judgment debtor had provided expert testimony or case authority supporting a different result, then the outcome might have been different. *Id.*

Corporate judgment debtors may face unique issues from individual judgment debtors. The alter ego doctrine applies in the supersedeas setting. *In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006). As to entities related to the judgment debtor, one court of appeals held that a consolidated balance sheet was not required. *LMC Complete Auto*, 229 S.W.3d at 484, 486. Another court held that distributions owed or paid to shareholders of a corporation should be treated as liabilities as long as the obligation is a valid one. *Texas Custom Pools*, 293 S.W.3d at 309, 310.

The point in time at which "net worth" should be measured may be important. Appellate Rule 24.2 requires a determination of "current net worth." TEX. R. APP. P. 24.2(a)(1). At least one court has held that "current" means at the time that the bond is set. *EnviroPower*, 265 S.W.3d at 5; *see also Payson Petro.*, 2015 Tex. App. LEXIS 6599, at *11 (rejecting judgment debtor's characterization of net worth evidence as "future looking" because testimony was not credible). It is unclear whether the amount needed to supersede the judgment could be modified if, during the appeal, the judgment debtor's net worth increases or decreases.

**2. Judgment for property, real and personal**

If the judgment is for recovery of an interest in real or personal property, the trial court must determine the amount of security the judgment debtor must post. TEX. R. APP. P. 24.2(a)(2); *Molinar v. Rafaei*, No. 08-14-00299-CV, 2015 Tex. App. LEXIS 6063, *2 (Tex. App.—El Paso June 16, 2015, on motion); *Devine v. Devine*, No. 07-15-00126-CV, 2015 Tex. App. LEXIS 5173, *5 (Tex. App.—Amarillo May 20, 2015, on motion). In the case of a judgment for an interest in real property, the amount of the bond, deposit or security must be the value of the property interest's rent or revenue. TEX. R. APP. P. 24.2(a)(2)(A); *Molinar*, 2015 Tex. App. LEXIS 6063, *2; *Devine*, 2015 Tex. App. LEXIS, *6-5; *BP Am. Prod. Co. v. Red Deer Res., LLC*, No. 07-14-00032-CV, 2014 Tex. App. LEXIS 7572, *8 2014 WL 3419496 (Tex. App.—Amarillo July 11, 2014, on motion). The amount of the bond should not be measured by the potential loss of profit or loss of future sales to the judgment creditor. *Culbertson v. Brodsky*, 775 S.W.2d 451, 454 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.). The proper measure of damages for rental property is the reasonable value of rents likely to accrue during the appeal. *TierOne Converged Networks, Inc. v. Lavon Water Supply Corp.*, No. 05-13-00370-CV, 2013 Tex. App. LEXIS 15357, *3 2013 WL 6727876 (Tex. App.—Dallas Dec. 19, 2013, on motion). A judgment creditor must do more than offer testimony of what it could lease the property for; it must show that the amount would be reasonable. *Id.* at *6.

In the case of a judgment for an interest in personal property, the amount of the bond, deposit or security must be

the value of the property interest on the date the court rendered judgment. TEX. R. APP. P. 24.2(a)(2)(B).

### 3. "Other judgment"

If the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security the judgment debtor must post. TEX. R. APP. P. 24.2(3); *Devine,* 2015 Tex. App. LEXIS 5173, at *6; *Sams v. Coker*, 514 S.W.2d 351, 352 (Tex. Civ. App.—Houston [1st Dist.] 1974, orig. proceeding); *Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1957, orig. proceeding); *see, e.g. Premier Pools Mgmt. Corp. v. Premier Pools, Inc.*, No. 05-14-01388-CV, 2015 Tex. App. LEXIS 1047, *3 (Tex. App.—Dallas Feb. 4, 2015, on motion) (permanent injunction). Arguably, this rule applies in the case in which the judgment is one for both money and property, since this hybrid judgment is not clearly one for recovery of money, or one for recovery of property. Judgments that have been treated as "other judgments" include injunctions, declaratory judgments, orders appointing a receiver, writs of mandamus issued by a district court, judgments in election contests, and turnover orders. *See* Robert B. Gilbreath & Curtis L. Cukjati, *Superseding the "Other Judgment,"* THE APPELLATE ADVOCATE 11 (Nov. 1998); *see also* TEX. PROP. CODE § 24.007(a) (writ of possession).

The legislature has foreclosed the suspension of some kinds of "other judgments" during an appeal. The final order of a district court on an order of the Texas Alcoholic Beverage Commission refusing, canceling, or suspending a permit or license may not be suspended. TEX. ALC. BEV. CODE § 11.67(b)(4). A temporary or permanent injunction issued to stop gang activity may not be suspended. *See* TEX. CIV. PRAC. & REM. CODE § 125.067(a).

In establishing the amount and type of security, the trial court must adequately protect the judgment creditor against loss or damage the appeal might cause. *Id.* Appellate Rule 24.2(a)(3) gives the trial court discretion to refuse to permit the judgment to be superseded if the ***judgment creditor*** posts security in an amount and type sufficient to secure the judgment debtor against any loss or damages caused by the judgment in the event the appellate court determines that the relief granted was improper. TEX. R. APP. P. 24.2(a)(3); *Devine*, 2015 Tex. App. LEXIS 5173, *6 However, Rule 24.2(a)(3) does not give the trial court discretion to refuse to set supersedeas. *Devine*, 2015 Tex. App. LEXIS 5173, *9.

### 4. Judgments for the government

Separate rules apply in the circumstance that the judgment is one for a governmental entity. *See* TEX. R. APP. P. 24.2(a)(5). If the judgment is one in favor of a governmental entity in its governmental capacity in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement. *Id.* The court may suspend enforcement with or without security and it should take into account the harm likely to result to the judgment debtor if enforcement is not suspended and the harm likely to result if enforcement is suspended. *Id.* The trial court's decision is reviewable by the court of appeals. *Id.* If the trial court requires security to suspend a judgment, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment. *Id.*

**5. Conservatorship and Custody**

If the judgment is one involving conservatorship or custody of a minor or other person under a legal disability, Rule 24.2(a)(4) provides that the judgment will not be suspended unless ordered by the trial court. TEX. R. APP. P. 24.2(a)(4). Unique to this subject matter, the same rule allows the appellate court to suspend enforcement with or without security "upon a proper showing." *Id.* Thus, it would appear that this paragraph provides for de novo review of the trial court's order or for an independent showing to support an order of suspension.

In suits affecting the parent-child relationship, the Texas Family Code further provides that an appeal from a final order, with or without a supersedeas bond, does not suspend the order unless suspension is ordered by the court rendering the order. TEX. FAM. CODE § 109.002(c); *Thornton v. Cash*, No. 14-11-01092-CV, 2013 Tex. App. LEXIS 4835, *25, 2013 WL 1683650 (Tex. App.—Houston [14th Dist.] Apr. 18, 2013, no pet.); *In the Interest of A.C.*, 394 S.W.3d 633, 640 (Tex. App.—Houston [1st Dist.] 2012, no pet.). On a proper showing, the appellate court may permit the order to be suspended, unless the order provides for the termination of the parent-child relationship in a suit brought by the state or a political subdivision of the state. *Id.*; *see, e.g., Wiese v. AlBakry*, No. 03-14-00799-CV, 2015 Tex. App. LEXIS 2713, *2 (Tex. App.—Austin Mar. 20, 2015, on motion) (per curiam); *In re R.H.M.*, No. 03-14-00603-CV, 2014 Tex. App. LEXIS 11051, *1, 2014 WL 4966543 (Tex. App.—Austin Oct. 3, 2014, on motion); *Marquez v. Marquez*, No. 08-12-00129-CV, 2012 Tex. App. LEXIS 3463, *3, 2012 WL 1555204 (Tex. App.—El Paso May 2, 2012, on motion).

**PARTIAL/REDUCED SUPERSEDEAS BONDS**

In general, a judgment debtor may not partially supersede a money judgment. *Haney v. Hurst*, 608 S.W.2d 355, 356 (Tex. Civ. App.—Dallas 1980, no writ). However, there is some older authority that provides that upon leave of court, a trial court may permit the filing of a partial supersedeas bond. Duncan, *supra* L-48-49. For example, in *Mudd v. Mudd*, 665 S.W.2d 128, 129 (Tex. App.—San Antonio 1983, no writ), the trial court granted the parties a divorce and then set a lump sum amount for a supersedeas bond in the amount of four million dollars. Because the husband's personal assets totalled less than $750,000, he was unable to bond the entire amount set. The trial court then ordered that the husband could partially superseded two parts of the judgment by posting a bond in the amount of $1.2 million dollars. *Id.* On review of the order, the court of appeals permitted the partial supersedeas, but ordered the amount reduced as excessive. *Id.*

Appellate Rule 24.2(b) and Texas Civil Practice and Remedies Code Section 52.006(c) give the trial court discretion to order a lesser amount of security than what would otherwise be required. TEX. R. APP. P. 24.2(b); TEX. CIV. PRAC. & REM. CODE § 52.002(c); *Payson Petro., Inc. v. Wheeler*, No. 05-14-00852-CV, 2015 Tex. App. LEXIS 6599, *3 (Tex. App.—Dallas June 26, 2015, on motion). If the court finds that posting the required security will cause the judgment debtor substantial economic harm, the trial court must lower the amount of security to an amount that will not cause the judgment

debtor substantial economic harm. TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(b); *Premier Pools Mgmt. Corp. v. Premier Pools, Inc.*, No. 05-14-01388-CV, 2015 Tex. App. LEXIS 1047, *3 (Tex. App.—Dallas Feb. 4, 2015, on motion). The net worth of the judgment debtor is not a factor in determining whether to reduce the amount of the bond. *Premier Pools*, 2015 Tex. App. LEXIS 1047 at *3-4. Factors the court may consider in determining if the judgment debtor will sustain substantial economic harm include (1) the cost of obtaining a bond; (2) the availability of sufficient assets to cover that cost; (3) the availability of other sources from which the debtor could secure funds to obtain a bond; (4) the judgment debtor's ability to borrow the funds; (5) the impact on the judgment debtor arising from the sale of assets sufficient to obtain a bond; and (6) the likelihood that selling assets to obtain a bond will result in insolvency of the debtor. *Id.* at *4. *Payson Petro.*, 2015 Tex. App. LEXIS 6599 at *3. Conclusory testimony without evidence addressing these factors may be insufficient to support a reduction in the amount to be suspended. *See Payson Petro.*, 2015 Tex. App. LEXIS 6599 at *13 (holding that judgment debtor failed to meet burden).

Prior to 2003, the supersedeas rule used a more burdensome "irreparable harm" standard. *See* TEX. R. APP. P. 24.2(b) (amended 2003). Under that standard, one court held that irreparable harm to the judgment debtor does not include proof of mere financial inability to post the full amount of the bond, deposit, or other security. *Harvey v. Stanley*, 783 S.W.2d 217, 219 (Tex. App.—Fort Worth 1989, no writ). However, proof that the judgment debtor would have to file bankruptcy if a reduction were not permitted apparently satisfied the irreparable harm requirement. *See Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996) (per curiam); *see also Texaco v. Pennzoil Co.*, 626 F. Supp. 250, 253 (S.D.N.Y.), *aff'd in part*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). Further, proof of a substantial affect on the price of a judgment debtor's stock, credit reputation, and credit ratings may also have constituted irreparable harm. *See generally Texaco, Inc.*, 626 F. Supp. at 252-53 (setting out facts that ultimately led to changes in Texas procedure, as set out more fully below).

From the judgment debtor's perspective, one downside to filing a motion to reduce the amount of the bond, deposit or other security is that it requires the judgment debtor to expose to the trial court and the judgment creditor details of the judgment creditor's financial picture. The evidence at the hearing on the motion to reduce the amount of the bond, deposit, or other security should be specific and clear. *Compare Isern*, 925 S.W.2d at 606 *with McDill Columbus Corp.*, 7 S.W.3d 923, 925-26 (Tex. App.—Texarkana 2000, no pet.). Many judgment debtors oppose the idea of making public such specific information, much less voluntarily providing the information to the judgment creditor. Of course, the judgment creditor would be entitled to much of this information through post-judgment discovery, and when the judgment debtor is faced with few or no alternatives, the better or only course may be one of disclosure.

The appellate rules and the statutory law have not always permitted a court to reduce the amount of security needed to supersede a judgment for

appeal. Prior to 1988, the trial court did not have the authority to reduce the amount of bond required to suspend execution on a judgment. *Isern*, 925 S.W.2d at 605. In 1987, however, a record judgment was rendered against Texaco, Inc., which brought to light the deficiencies in the rules of procedure that were then applicable. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (opinion on merits of appeal). Thus, in 1988, the Texas Supreme Court amended old Appellate Rule 47, providing for the first time that the trial court could order a reduced bond if the court found that posting a bond for the full amount would *irreparably harm* the judgment debtor and a reduced amount would not substantially harm the judgment creditor. Earnest E. Figari, Jr., et al., *Texas Civil Procedure*, 42 SW. L.J. 523, 556 (1988). The rule was also amended to provide for the first time that the trial court had continuing jurisdiction, and to provide for appellate review of trial court orders regarding the supersedeas bond. *Id.* at 556-57.

In 1989, the legislature also responded to the inequities highlighted by the *Texaco* predicament, and enacted Chapter 52 of the Texas Civil Practice and Remedies Code. Act of May 20, 1989, 71st Leg., R.S., ch. 1178, § 1, 1989 Tex. Sess. Law Serv. 4813 (Vernon) (now codified at TEX. CIV. PRAC. & REM. CODE §§ 52.001-.006). The initial legislative response was more narrow than the Texas Supreme Court's response, and established a procedure for reducing the amount of the bond in cases awarding 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." TEX. CIV. PRAC. & REM. CODE § 52.002 (repealed 2003). The standard established by the statute for a reduction of the bond, however, differed from the standard contained in the appellate rule with respect to the second prong of the test relating to the interests of the judgment debtor. In particular, the second prong of the test as set out in the appellate rule required the court to determine whether a reduced amount of bond would substantially harm the judgment creditor. The statute, on the other hand, required the court determine whether a lower bond amount would substantially decrease the degree to which the judgment creditor's recovery under the judgment would be secured after exhaustion of all appellate remedies. TEX. CIV. PRAC. & REM. CODE § 52.002(2) (repealed 2003). Therefore, in response to the enactment of Section 52.002, the Texas Supreme Court again amended old Rule 47 in 1990, to conform it to the legislative enactment. The amended rule adopted the legislature's standard for cases falling within the terms of Chapter 52, but the prior standard was retained for cases not governed by Chapter 52. *Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence*, 53 TEX. B.J. 589, 609 (1990); *Isern*, 925 S.W.2d at 605-06 (holding that amended Rule 47 and Section 52.002 do not conflict). Although there are no cases discussing the differences in these two standards and in what respects they were different, at least one court suggested that the two standards were basically the same. *See McDill Columbus*, 7 S.W.3d at 925; *see also* Kevin W. Liles, Comment, *Supersedeas Bonds: The Ostensible Authority Struggle over Who Gets a*

*Reduction*, 48 BAYLOR L. REV. 469, 476-77 (1996) (discussing legislative intent regarding reason for different standards).

Although the Texas Supreme Court and the Texas legislature responded to the criticisms and concerns raised by the *Texaco* judgment, therein providing a procedural framework by which a judgment debtor may seek a reduction of the amount of security required to be posted to suspend execution, it is not clear that the court and legislature have fully addressed the parameters of the constitutional issues that *Texaco* raised. *See generally Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *see also* Elaine A. Carlson, *Mandatory Supersedeas Bond Requirements—A Denial of Due Process Rights?*, 39 BAYLOR L. REV. 29, 32 (1987). In particular, it remains to be seen whether the procedural framework and standards adopted pass constitutional muster. A full discussion of those constitutional issues is beyond the scope of this paper.

## WHO MUST SIGN THE BOND AND WHO MAY PROVIDE THE BOND

### 1. Sufficient sureties

A supersedeas bond is a surety bond. A surety is one "who undertakes to pay money or to do any other act in the event that his principal fails therein." BLACK'S LAW DICTIONARY 1441 (6th ed. 1990); *see also Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985); *accord Universal Auto. Ins. Co. v. Culberson*, 51 S.W.2d 1071, 1072 (Tex. Civ. App.—Waco 1932, no writ). "The relation of principal and surety as applied to individuals necessarily involves separate personalities." *Universal Auto.*, 51 S.W.2d at 1071. A person cannot be a surety for himself. *Id.* Thus, a third-party, legally separate from the debtor and not a party to the suit, contracts to pay the judgment plus interest if the appeal is unsuccessful and the judgment creditor fails to perform. *Amwest Surety Ins. Co. v. Graham*, 949 S.W.2d 724, 726 (Tex. App.—San Antonio 1997, writ denied); *see* TEX. R. APP. P. 24.1(a), (b)(1)(D), (d).

The surety must be "sufficient" under Rule 24.1(b)(D). To be sufficient, at a minimum, the surety must be able itself to discharge the judgment. *State Farm Lloyds, Inc. v. Williams*, No. 05-93-00191-CV, 1993 WL 449197, *1 (Tex. App.—Dallas 1993, writ denied) (unpublished).

The trial court has jurisdiction, upon proper motion, to review and determine the sufficiency of sureties, "including the relationship between the sureties and the appellant and the likelihood that the sureties will in fact be able or willing to satisfy the judgment." *See, e.g., Wells v. Colin*, No. 05-97-00063-CV, 1997 WL 200755, 1997 Tex. App. LEXIS 2189 (Tex. App.—Dallas Apr. 25, 1997, on motion) (unpublished) (involving motion to review based on the appellant's transfer of substantial assets to a limited partnership in which his parents, the sureties, were also limited partners). The party tendering the bond has the burden to demonstrate that the surety is sufficient. *Transamerican Natural Gas Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex. App.—San Antonio 1995, on motion); 1 STATE BAR OF TEXAS, TEXAS APPELLATE PRACTICE MANUAL § 13.3:3 (citing *Universal Transport & Distrib. Co. v. Cantu*, 75 S.W.2d 697, 698 (Tex. Civ. App.—San Antonio 1934, orig. proceeding)). A trial court abuses its discretion if it fails to permit the judgment creditor to inquire whether the surety is sufficient. *Lamar County Elec. Coop. Ass'n v. Risinger*, 51

S.W.3d 801, 803 (Tex. App.—Texarkana 2001, on motion). Upon motion, the court of appeals may review the sufficiency of the surety. TEX. R. APP. P. 24.4(a)(2); *Lamar County Elec. Coop.*, 51 S.W.3d at 803.

**a. Who may serve as sufficient surety**

The case law reveals the following rules regarding who may be a "sufficient" surety:

- An entity that is legally separate from the judgment debtor. 1 STATE BAR OF TEXAS, TEXAS APPELLATE PRACTICE MANUAL, § 13.3 (citing *Universal Automobile Ins. Co. v. Culberson*, 51 S.W.2d 1071 (Tex. Civ. App.—Waco 1932, motion granted)); *Transamerican Natural Gas Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex. App.—San Antonio 1995, on motion).

- The surety is insufficient if its only asset is stock in the judgment debtor. *See TransAmerican Nat. Gas. Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex. App.—San Antonio 1995, on motion); *see also Ischy v. McCammon*, No. 03-12-00661-CV, 2013 Tex. App. LEXIS 2345, *9 (Tex. App.—Austin Feb. 28, 2013, on motion).

- A non-party. *TransAmerican Nat. Gas. Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex. App.—San Antonio 1995, on motion); *Elliott v. Lester*, 126 S.W.2d 756 (Tex. Civ. App.—Dallas 1939, no writ).

- One defendant may not be a surety for another defendant in the same suit. *Ringgold v. Graham*, 13 S.W.2d 355, 356 (Tex. Comm'n App. 1929, judgm't adopted).

- The person signing the bond must be authorized by a valid power of attorney or corporate resolution. *See, e.g., Kantor v. Herald Publishing Co.*, 632 S.W.2d 656, 658 (Tex. App.—Tyler 1982, no writ). *Care should be taken to demand to review of any potential side-agreements or indemnity arrangements related to the bond. Often, such agreements will be referenced in the power of attorney.*

**b. Liability insurers**

A great deal of confusion has been presented by the notion that a supersedeas bond requires security in addition to the personal liability of the party responsible for payment of the judgment. This notion is relied on by the court in *Elliott v. Lester*, 126 S.W.2d 756 (Tex. Civ. App.—Dallas 1939, on motion), in reaching the conclusion that an insurer responsible for paying the judgment for its insured may not itself be the surety on a supersedeas bond. The court engaged in a bizarre analysis that basically concluded that the carrier defending its insured becomes its insured. Given this virtual representation, the carrier is in effect a party to the judgment, the court reasoned. Thus, the insurer for the defendant provides no "additional" security.

The *Elliott* Court's reasoning is erroneous in numerous respects. The primary purpose of a supersedeas bond is

to provide assurance that the judgment will be paid. A bond with the liability insurer as surety accomplishes this task. The filing of a bond is not a mere redundancy. While the judgment creditor may sue the carrier up to policy limits after obtaining the judgment, the supersedeas bond commits the funds and provides the assurance of a third-party that the judgment will be paid. If the courts are willing to accept a cash deposit in lieu of bond, which requires only the certainty of payment without the involvement of a third-party's additional assets, then why not accept a bond signed by the carrier?

In fact, the court in *Universal Transport & Distributing Co. v. Cantu*, 75 S.W.2d 697, 698 (Tex. Civ. App.—San Antonio 1934, orig. proceeding), held that a liability insurer is not a party to the underlying suit against the insured and is therefore competent to become a surety on a supersedeas bond. The court in *Elliot* rejected *Cantu* based on its conclusion that the carrier was the real party in interest. The court does not seem to have considered whether the purpose of providing security was satisfied.

**c. Insurance Code issues**

Section 3503.004(a) of the Texas Insurance Code provides that surety obligation is in an amount that exceeds 10 percent of the company's capital and surplus, the court may require written certification that the company has reinsured the portion of the risk that exceeds 10 percent of the company's capital and surplus with one or more reinsurers who are authorized, accredited, or trusteed to engage in business in this state. TEX. INS. CODE § 3503.004(a).

The Texas Department of Insurance is required to furnish on request the amount of the allowed capital and surplus as of the date of the last annual statutory financial statement for a surety company or reinsurer authorized to engage in business in the State of Texas. TEX. INS. CODE § 35003.004(c).

The only case to address the meaning of Insurance Code Section 3503.004(a) is *State Farm Lloyds, Inc. v. Williams*, 1993 WL 449197, *1 (Tex. App.—Dallas 1993) (unpublished). In that case, the court held that this statutory requirement does not require that the carrier write any particular lines of coverage, such as fire and allied lines of insurance. The court also noted that the statute does not bar a carrier from writing a bond that exceeds 10% of capital and surplus. Instead, the court or public officer involved has the discretion to require that reinsurance be obtained. The court held that the failure to have such reinsurance was therefore not a basis for finding the bond inadequate. The court recognized that the carrier offered to present a certificate of reinsurance at the hearing on the sufficiency of the bond.

The court in *Williams* recognized that there is an Insurance Code provision that requires that no carrier (a) authorized to do business in the state; (b) which writes fire and allied lines of insurance, (c) shall expose itself to any one risk in an amount exceeding ten (10%) per cent of its paid-up capital stock and surplus, unless the excess shall be reinsured by such company in another solvent insurer. *See* TEX. INS. CODE § 862.101. Insurance Code Section 862.101 applies so long as the insurer is authorized to write "fire and allied lines of insurance." *Id.* § 862.101(a). The carrier cannot avoid the statute by urging that it was authorized but had not issued any such policies. Op. Tex. Att'y Gen. No. JM-850 (1988). Similar restrictions are

placed on insurers incorporated in jurisdictions outside the United States. Tex. Ins. Code § 862.101(c), (d). The reinsurance company must be one authorized to transact reinsurance or insurance in the state as to the lines of insurance set forth in the statute. *Id.*

A judgment creditor should present evidence relating to either statute to the attention of the court in a motion to review sufficiency of the bond. The Texas Department of Insurance can and will provide information on capital and surplus and certificates as to whether the carrier writes "fire and allied" lines of insurance. *Williams*, 1993 WL 449197, at *1 (certificate from Texas Insurance Commissioner presented for the first time on appeal could not be considered in determining whether the trial court abused its discretion in denying a motion to strike bond).

**d. Other insurance-related issues**

A number of issues are raised by the supersedeas process as it relates to liability insurers. First, an insurer that agrees to obtain a supersedeas bond will often do so through a sister or subsidiary company. As with any other company, care must be taken to make sure that the company providing the bond has its own assets and is a separate entity. Also, one should consider whether discovery should be conducted to determine whether collateral agreements have been reached between the carriers that may somehow undermine the requirement recognized by some courts for a separate additional assurance. The mere fact that collateral has to be put up for the bond is not itself a legitimate basis for claiming the bond is insufficient. Fronting and other similar arrangements can certainly be imagined in which problems might, however, arise.

Second, an insurer which has raised coverage defenses in a reservation of rights gives up those defenses if it bonds the judgment unless some special action is taken. The bond amounts to a new contract that is not dependent on the conditions, terms and exclusions of the insurance policy. A reservation letter stating that the bonding is not intended to be a waiver of policy defenses and reserving the right to reimbursement of any amounts ultimately required to paid on the bond that involve amounts not covered by the underlying liability policy may provide a basis for both bonding the case so the appeal can go forward, but preserving the ability to recoup uncovered amounts if the appeal is unsuccessful. This approach is not without peril.

The primary problem for the insurer in this setting is whether the insured is solvent and thus could actually reimburse it. An additional problem is presented is whether an insurer may unilaterally reserve the right to reimbursement. Without the consent of the insured or a right of reimbursement in the insurance agreement, the insurer may not unilaterally reserve a right of reimbursement. *See Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 50 (Tex. 2008).

Finally, insurers facing a judgment in excess of policy limits face the issue of whether a partial supersedeas bond may be filed. Again, the dilemma facing the carrier is that if it bonds the entire case, it will contractually bind itself through a new surety contract to pay amounts greater than those set forth in the policy. Roland C. Gross, *Partial Supersedeas: The Ability of Insurance Companies to Stay Execution by Posting a Bond in the Amount of the Policy Limits*, 16 BAD FAITH LAW REPORT 29

(March 2000) [hereinafter Gross]. If no supersedeas is posted, the insurer could be sued by the judgment creditor for amounts up to the policy limits.

As discussed above, it is possible to obtain a reduction in the amount of the security required to be posted. *See* discussion *supra* 20-23; TEX. R. APP. P. 24.2(b). In fact, if the standards in Rule 24.2(b) are met, it may be possible to lower the amount to the amount of insurance coverage available. In *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996), the Texas Supreme Court held that the trial court had discretion to permit the filing of a supersedeas bond for only the amount of the defendant's liability insurance under former Appellate Rule 47(b). The supreme court noted that the trial court found: (1) a full bond would be in the amount of $3.1 million; (2) the liability insurer would only post a $500,000 bond; (3) the defendant/insured had assets of $500,000, including a $150,000 homestead; (4) the defendant/insured could not post the remainder in excess of $500,000; (5) absent a modification of the bond amount, the defendant/insured would be forced into bankruptcy; and (6) if bankruptcy ensued, the plaintiffs would be left with a bankrupt defendant and no security. *Id.* The supreme court held that the court of appeals abused its discretion in overturning the ruling of the trial court permitting the filing of a $500,000 bond. *Id.* (overruling *Laird v. King*, 866 S.W.2d 110, 115 (Tex. App.—Beaumont 1993, orig. proceeding)).

The majority of jurisdictions looking at the issue of potential bad faith arising from an insurer's effort to file a partial supersedeas bond have held that an insurer may partially supersede as to its interests up to policy limits. This result has not been changed where allegations of bad faith were urged. Gross, *supra* 32. The insured in this situation can either bond the remaining amount or execution will issue just against the insured for the portion not covered by the policy limits bond. *Id.* Courts rejecting the majority view have either complained that the rules in their states do not permit a partial supersedeas or have held that the insurer is not a party to the underlying suit and thus it would be "inappropriate" for the insured /defendant to benefit from the fact that it did not purchase enough insurance. *Id.*

As a general rule, liability insurers typically have no obligation to provide a supersedeas bond for amounts in excess of their policy limits. Most policies do, however, require the carrier to pay the premium on supersedeas bonds.

Insurers with a judgment against an insured in excess of limits face the peril of the insured dismissing the appeal. This itself could result in the loss of coverage unless some breach by the carrier has excused the insured from the requirements that it cooperate in the defense of the case. Nevertheless, the insurer could chose to reach an agreement with the insured to go ahead and bond the entire judgment. The insured in this setting should be careful to obtain full protection from any judgment sustained or modified by the court of appeals or supreme court and should obtain protection from any judgment resulting from a new trial after remand.

Insurers facing a judgment in excess of limits should consider offering a guaranteed amount to the plaintiff to agree to stay execution. However, the most productive alternative may be a high-low settlement, which would amount to a settlement of the entire case

instead of just a guaranteed, non-refundable non-execution fee.

**e. Multiple sureties**

Some judgments are simply too big for any one surety to handle. Nothing in the rules suggests that multiple sureties may not be used. In fact, Appellate Rule 24.1(b)(1)(D) states that the bond must be signed by "a sufficient surety or *sureties* . . . ."

Obviously, the greater the number of sureties, the greater the burden of establishing the sufficiency of the sureties. One source states that where multiple sureties are used to do a joint bond for multiple defendants, each surety should promise to pay the entire judgment. Julia F. Pendery & Ken W. Good, *Chaining the Rottweiler—Miscellaneous Challenges in Supersedeas Bond Practice, in* STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE LAW COURSE U-7 (1997). Thus, the sureties would in effect be jointly liable for the judgment. Certainly, one can imagine a scenario in which joint sureties could be used without joint liability by disclosing the percentages each is to pay and at what attachment point (like primary, excess and super-excess policies). Additional proof of solvency would be required under TEX. INS. CODE §§ 3503.004 or 862.101. If the liability is, however, to be joint and several, then each surety would likely be required to independently satisfy the Insurance Code provisions. Obviously, if multiple sureties are used and their liability is joint and several, then proof that one of the sureties is solvent to pay the judgment is sufficient. *See, e.g., Ruiz v. Watkins*, 701 S.W.2d 688 (Tex. App.—Amarillo 1985, orig. proceeding).

**2. Principals**

The judgment debtor or the judgment debtor's agent must sign the bond. TEX. R. APP. P. 24.1(b)(1)(C). The bond is defective on its face if it is not signed in this manner, and it is unlikely the trial court clerk will approve it. If the trial court clerk does approve it, the bond is subject to challenge.

In the case of multiple judgment debtors, each one must file a bond or deposit unless exempted by statute. If any relief or award in the judgment is joint and several, the filing of a bond by only one of the judgment debtors will not inure to the benefit of the other judgment debtors. *Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1957, orig. proceeding). Each judgment debtor must either separately file a bond or deposit for the full amount of the judgment against him (inclusive of the joint and several amount), or the joint and several judgment debtors may file a single, joint bond. *Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co.*, 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ). This requirement is necessary to ensure the adequate protection of the judgment creditor in the event the judgment is reversed as to only one of the appealing judgment creditors or if the judgment creditor is unable to collect against one of the judgment debtors. *Fortune*, 645 S.W.2d at 935.

If one or more of joint and several judgment debtors files an affidavit of net worth, and a challenge is filed, the net worth of each individual judgment debtor must be determined separately. *Hunter Bldgs. & Mfg., L.P. v. MBI Global, L.L.C.*, No. 14-12-00246-CV, 2013 Tex. App. LEXIS 5283, *8-9 (Tex. App.—

Houston [14th Dist.] Apr. 30, 2013, on motion).

One issue that has not been resolved, however, is how Appellate Rule 24.2(a)(1)'s $25 million limitation applies when the amount to be superseded exceeds $25 million and there are multiple judgment debtors. The question here is whether the cap applies per judgment or per judgment debtor. This issue was presented to the Texas Supreme Court in *In re Longview Energy Co.*, 464 S.W.3d 353 (Tex. 2015), but the court did not reach that issue due to the fact that it determined that the amount of damages to be superseded was below $25 million.

## FILING AND APPROVAL OF THE BOND

The clerk must *file* a bond upon its tender regardless of whether the clerk approves or disapproves of the bond. TEX. R. APP. P. 24.1(a). To be effective, the bond must be approved by the trial court clerk. TEX. R. APP. P. 24.1(b)(2); *accord Hamilton v. Hi-Plains Truck Brokers, Inc.*, 2000 WL 365281 (Tex. App.—Amarillo, April 10, 2000, no pet.) (not designated for publication).

Prior to adoption of Appellate Rule 24.1, the former rules had no provision requiring that the clerk approve the bond in the first instance and practices varied across the state. In some courts, the judge had to approve the bond, while in others, the clerk did so. Thus, Appellate Rule 24.1 establishes a uniform practice of requiring the clerk to approve the bond in the first instance, and afford the judgment creditor a right to contest the approval by filing a motion with the court. *See* TEX. R. APP. P. 24.1(b)(2).

On motion of any party, the trial court will review the bond. TEX. R. APP. P. 24.1(b)(2). The trial court has continuing jurisdiction to review the sufficiency of the bond on any party's motion. TEX. R. APP. P. 24.3; *Hamilton*, 2000 WL 365281, at *1. The actions of the clerk in approving or disapproving a bond are judged by an abuse of discretion standard. *See, e.g., Ruiz v. Watkins*, 701 S.W.2d 688, 691 (Tex. App.—Amarillo 1985, orig. proceeding). In approving a bond, the clerk must determine whether the surety may serve as a surety and whether the surety is solvent and able to pay the judgment. *Id.* Thus, the party filing the bond should be prepared to establish that the surety is "financially able to pay the judgment, interest and costs." 1 STATE BAR OF TEXAS, TEXAS APPELLATE PRACTICE MANUAL § 13.3:3 (discussing *Ruiz, supra*). This burden may be carried by producing documentary evidence or affidavits of the surety. *Ruiz*, 701 S.W.2d at 691.

The party opposing the filing of the bond may present contrary evidence showing the insolvency of the surety. *See, e.g., Groves v. Western Realty Co.*, 84 S.W.2d 835 (Tex. Civ. App.—Dallas 1935, no writ). Evidence that a surety is insufficient will not be considered if raised for the first time in the court of appeals. *State Farm Lloyds, Inc. v. Williams*, 1993 WL 449197, *1 (Tex. App.—Dallas 1993) (unpublished).

## POST-FILING ISSUES

### 1. Trial court's continuing jurisdiction

The ***trial court*** has continuing jurisdiction to review the bond for (a) amount, (b) type of security, (c) sufficiency of the sureties, and (d) consideration of any changes in circumstances that may alter the amount or type of security. TEX. R. APP. P.

24.3(a)(1), (2). A motion challenging the bond should be supported with proof and/or verified. Moreover, a hearing should be requested. The trial court's actions are reviewed under an abuse of discretion standard. *See, e.g., McDill Columbus Corp. v. University Woods Apts., Inc.*, 7 S.W.2d 923, 924 (Tex. App.—Texarkana 2000, no pet). Competent evidence must be presented to support the desired ruling, either through evidence attached to the motion or in the form of testimony at the hearing. Evidence may not be presented for the first time on appeal. *State Farm Lloyds, Inc. v. Williams,* 1993 WL 449197, *1 (Tex. App.—Dallas 1993) (unpublished); *see also Universal Transport & Distrib. Co.*, 75 S.W.2d at 698; *but see* TEX. R. APP. P. 24.4(b) (allowing appellate review based on changed conditions) *and* TEX. R. APP. P. 24.2(a)(4) (allowing initial showing to be presented to court of appeals).

The judgment debtor has the duty to notify the appellate court of any modifications to the bonding requirements. TEX. R. APP. P. 24.3(b). Usually a supplemental clerk's record must be prepared if a new or amended bond is filed.

**2. Appellate review**

The court of appeals has broad power to conduct appellate review of trial court actions regarding bonds. The court of appeals may review (1) the sufficiency or excessiveness of amount of security, including a net worth determination, (2) the sureties on the bond, (3) the type of security, (4) the determination of whether to permit suspension, and (5) the trial court's exercise of its continuing jurisdiction. TEX. R. APP. P. 24.4(a)(1)-(5); *BP Am. Prod. Co. v. Red Deer Res., LLC,* No. 07-14-00032-CV, 2014 Tex. App. LEXIS 7572, *6, 2014 WL 3419496 (Tex. App.—Amarillo July 11, 2014, on motion). Challenges to the bond are usually made in the form of a motion to review sufficiency of or a motion to modify supersedeas bond. The motion must be heard by the appellate court "at the earliest practical time." TEX. R. APP. P. 24.4(d). The appellate rules set forth "grounds for 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.

TEX. R. APP. P. 24.4 (b). The appellate court will apply an abuse of discretion standard to its review of the lower court's rulings. *BP Am. Prod. Co.*, 2014 Tex. App. LEXIS 7572 at *5-6.

The scope of action the court of appeals may take is also very broad. The court may alter the amount, alter the type of security, require another bond or security to be filed, as well as make "other changes to the trial court's order." TEX. R. APP. P. 24.4(b). Finally, the court of appeals may remand to the trial court for the entry of findings of fact and/or for the taking of evidence. *Id.*

The rules provide a critically important breathing period of twenty days within which a bond or security complying with the court's ruling may be filed before enforcement may be undertaken. TEX. R. APP. P. 24.4(e). The failure to timely respond as required by the court could result in the loss of the ability to suspend enforcement of the judgment. 1 STATE BAR OF TEXAS, TEXAS APPELLATE PRACTICE MANUAL § 13.6:2. Modifications, such as an increase in the amount of the bond, may be accomplished by filing of a bond just for the additional required amount. The

rules expressly state that the posting of additional security itself does not release or affect previously posted security unless otherwise ordered by the court. TEX. R. APP. P. 24.4 (e).

The supreme court may review the ruling of the court of appeals by petition for mandamus. *In re Smith*, 192 S.W.3d 564, 566 (Tex. 2006) (treating a motion for review as petition for writ of mandamus); *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996).

**3. Injunction**

Appellate rule 24.2(d) allows a trial court to enjoin a judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment. TEX. R. APP. P. 24.2(d). However the court may not make an order that interferes with the judgment debtors use, transfer, conveyance, or dissipation of assets in the normal course of business. *Id.* On paper, these parameters seem reasonable. In practice, however, an order that merely incorporates the very language of the rule is seldom helpful or comforting to the judgment debtor, which must make decisions as to whether a particular action will be deemed a dissipation of assets outside the course of normal business, such that the debtor subjects himself to a potential action for contempt. In terms of the proof necessary to obtain a temporary injunction, some appellate courts appear to have concluded that not all elements of proof ordinarily required for injunctive relief are required. *See Nelson v. Vernco Constr., Inc.*, 367 S.W.3d 516, 521 (Tex. App.—El Paso 2012, on motion); *Emeritus Corp. v. Ofczarzak*, 198 S.W.3d 222, 227 (Tex. App.—San Antonio 2006, on motion). At least one court has concluded that a trial court abuses its discretion in ordering a post-judgment injunction if the only reasonable decision that could be drawn from the evidence is that the judgment debtor would not dissipate or transfer its assets. *Tex. Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 314 (Tex. App.—El Paso 2009, on motion).

4. **Post-judgment discovery**

In general, the posting of a bond or its equivalent terminates discovery in aid of enforcement of the judgment. TEX. R. CIV. P. 621a. However, a party is entitled to conduct discovery in connection with a motion permitted under Appellate Rule 24. *Id.*; *In re Longview Energy Co.*, 464 S.W.3d 353, --, 2015 Tex. LEXIS 438, *17 (Tex. 2015). Further, where a trial court allows reduced or alternate security, it appears that the trial court may permit reasonable, on-going discovery that provides information to the judgment creditor as to whether the judgment debtor is dissipating assets. *See* TEX. R. APP. P. 24.1(e); *In re Longview Energy Co.*, 464 S.W.3d at __.

**5. Post-appeal settlement**

Where there are multiple defendants and one settles while the case is on appeal, the remaining defendant may seek a modification of the bond amount where the defendant had bonded a joint and several judgment. Julia F. Pendery & Ken W. Good, *Chaining the Rottweiler—Miscellaneous Challenges, in Supersedeas Bond Practice, in* STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE LAW COURSE U-7 (1997). As these commentators point out, the settlement post-appeal settles the full portion of the judgment for which the settling defendant had several liability. Any other approach would inappropriately allow the plaintiff to cut off the defendant's right to contribution. *Id.* (citing *Palestine Contractors v.*

*Perkins,* 386 S.W.2d 764, 767 (Tex. 1964)).

**6. Concluding the appeal/release of the bond**

Reversal of the judgment releases the supersedeas bond. *See, e.g., Resolution Trust Corp. v. Chair King, Inc.,* 827 S.W.2d 546, 550 (Tex. App.—Houston [14th Dist.] 1992, no writ). A reversal and remand for a new trial also results in release of the bond or security. *Edlund v. Bounds,* 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied). Following a reversal, the now-former judgment debtor cannot recover the cost of the premium for a supersedeas bond as a cost of court. Texas law does not categorize that cost as a cost of court. *Hammonds v. Hammonds,* 313 S.W.2d 603, 605 (Tex. 1958).

The failure of the language of the bond or other security to properly reflect the conditions set forth in the Rules of Appellate Procedure can modify the circumstances under which the bond is payable or released. *See, e.g., Resolution Trust,* 827 S.W.2d at 550 (holding that wording of cash deposit in lieu of bond was not worded so that it only applied to the original judgment).

Affirmance of the judgment, dismissal of the appeal or the failure to perfect the appeal makes the surety potentially liable on the bond. TEX. R. APP. P. 24.1(d)(1). However, the surety is only liable if the judgment debtor fails to perform or pay the judgment. *Id.*

Enforcement of the bond can be accomplished through (a) amendment of the judgment to include the surety so that collection may be undertaken, (b) a breach of contract action could be brought against the surety, or (c) a motion may be made to the appellate court for judgment against the sureties on the bond. *Universe Life Ins. Co. v. Giles,* 982 S.W.2d 488, 491 n.21 (Tex. App.—Texarkana 1998, no writ) (citing *Muniz v. Vasquez,* 797 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1990, no writ)).

The bond or other security cannot be released until the judgment is final. *Giles,* 982 S.W.2d at 490. One appellate court has concluded that the release of the bond need not be delayed by waiting for the issuance of the mandate. The mandate is an official notice and is not required to render the judgment final. *Id.* at 491. Application for release of the surety may not be made to the trial court while the case is pending on appeal. *Muniz,* 797 S.W.2d at 150.