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Supersedeas – What for and how much?

Daryl L. Moore

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Daryl L. Moore
DARYL L. MOORE, P.C.
1005 Heights Boulevard
Houston, Texas 77008
713.529.0048
daryl@heightslaw.com

TABLE OF CONTENTS

I.	Supersedeas, generally.....	1
II.	Supersedeas, historically..	1
III.	Supersedeas, today.....	2
1.	When the judgment is for money.....	2
A.	What constitutes compensatory damages under the supersedeas statute?.....	2
B.	What about equitable forfeiture/disgorgement?.....	5
C.	What about interest on non-compensatory damages?.....	6
D.	What about costs?.....	7
2.	When the judgment is for the recovery of an interest in real or personal property.....	7
A.	Real property.....	7
B.	Personal property.....	8
3.	When the judgment is for something other than an interest in property..	8
4.	The caps on security..	9
A.	The \$25-million cap..	9
B.	The net-worth cap..	10
C.	Do the caps apply only to money judgments..	10

SUPERSEDEAS – WHAT FOR AND HOW MUCH?

By Daryl L. Moore

This paper focuses mainly on what types and how much security is required to supersede different types of judgments. It also contemplates practice tips and strategies judgment creditors might consider regarding how to obtain adequate security for a judgment, and that judgment debtors might consider to avoid over-securing a judgment.

This paper is not comprehensive. For a comprehensive analysis of supersedeas, the starting point is – as always – Elaine Carlson’s latest supersedeas paper.

I. Supersedeas, generally.

A judgment debtor is entitled to supersede and defer payment of the judgment while pursuing an appeal. *Miga v. Jensen*, 299 S.W.3d 98, 100 (Tex. 2009). The purpose of supersedeas is to: (1) preserve the status quo of the matters in litigation as they existed before issuance of the appealed judgment, *Ranger v. Jeffrey*, 182 S.W.2d 701, 701 (Tex. 1944) (orig. proceeding); *Smith v. Tex. Farmers Inc. Co.*, 82 S.W.3d 580, 585 (Tex.App.–San Antonio 2002, pet. denied); and (2) secure the appellee and abate the remedies he would otherwise have for realizing his judgment. *Whitmire v. Greenridge Place Apartments*, 333 S.W.3d 255, 262 (Tex.App.–Houston [1st Dist.] 2010, pet. dism’d); *Carter Real Estate & Dev., Inc. v. Builder’s Serv. Co.*, 718 S.W.2d 828, 830 (Tex.App.–Austin 1986, no writ)).

II. Supersedeas, historically.

Seventeenth century English statutes required a judgment debtor to provide security – not just for the amount of the judgment — but often for twice the amount of the judgment, guaranteeing payment of the judgment if affirmed. *In re Longview Energy Co.*, 464 S.W.3d 353, 357 (Tex. 2015) (orig. proceeding). Apparently, this was the prevailing view in the colonies and was the law by statute in Texas from statehood until the adoption of the Texas Rules of Civil Procedure in 1940. *See id.*

In 1940, the Texas Supreme Court through its rule-making authority reduced the amount of security required from double the amount of judgment, plus interest and costs, to just the amount of judgment, plus interest and costs. *Id.* With only minor changes, this remained the rule for almost 50 years, until Pennzoil obtained a \$10.53-billion judgment against Texaco, Inc. *Id.* (referring to *Texaco, Inc. v Pennzoil Co.*, 729 S.W.2d 768 (Tex.App.–Houston [1st Dist.] 1987, writ ref’d n.r.e.).

In 1988, the Texas Supreme Court amended then-Rule 47 (formerly TEX.R.CIV.P. 364), to allow alternate security in any appeal “provided the party seeking alternate security could prove that posting the full amount of the bond would cause irreparable harm to the judgment debtor and not posting the full bond would cause no substantial harm to the judgment creditor.” *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 605 (Tex. 1996, orig. proceeding); TEX.R.APP.P. 47.

One year later, the Legislature stepped back into the supersedeas arena by enacting Chapter 52 of the Civil Practice and Remedies Code, establishing a slightly different standard than that adopted by the Supreme Court in Rule 47. *Id.* The new statute vested the trial court with discretion

to reduce the amount necessary to supersede certain judgments under certain circumstances for less than an amount “equal to the amount of the judgment, interest, and costs.” *Id.*; Act of June 16, 1989, 71st Leg., R.S., ch. 1178, § 1, 1989 Tex. Gen. Laws 4813, 4813-14. That version of Chapter 52 also provided for appellate review of the trial court’s determination, both for sufficiency and for excessiveness. *Id.* The Supreme Court then amended Rule 47 again, to conform the rule to the new statute. *Isern*, 925 S.W.2d at 606.

In 2003, with the enactment of House Bill 4, the Legislature increased protections for judgment debtors and their right of appeal. *In re Longview*, 464 S.W.3d at 358. “House Bill 4 ‘reflect[ed] a new balance between the judgment creditor’s right in the judgment and the dissipation of the judgment debtor’s right to meaningful and easier access to appellate review.’” *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 170 (Tex. 2013) (orig. proceeding) (quoting Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgment on Appeal after House Bill 4*, 46 S. TEX. L. REV. 1035, 1038 (2005)). Before House Bill 4, a party seeking to suspend execution was required to post security covering the entire judgment, regardless of the amount, plus costs and interest. *Id.*

The new statute enacted with House Bill 4, Section 52.006, requires security *only* for compensatory damages, interest, and costs; imposes an absolute cap; and vests the trial court with more discretion in reducing the amount of security required to suspend execution. *In re Longview*, 464 S.W.3d at 358. The Supreme Court then amended Rule 24.2 (former Rule 47) of the Rules of Appellate Procedure to track Section 52.006. *Id.* at 359. Thus, since 1988, both the Supreme Court and the Legislature have “deliberately” made a judgment debtor’s ability to supersede “more easily available.” *Id.* at 360.

III. Supersedeas, today.

Section 52.006 of the Texas Civil Practice and Remedies Code and Texas Rule of Appellate Procedure 24 set out the requirements for suspending enforcement of the judgment. TEX.CIV.PRAC.& REM.CODE ANN. §52.006; TEX.R.APP.P. 24.

1. When the judgment is for money.

When a judgment is for money, the amount of security: (A) must equal the sum of: (1) the amount of compensatory damages awarded in the judgment; (2) interest for the estimated duration of the appeal; and (3) costs awarded in the judgment. TEX.CIV.PRAC.&REM.CODE ANN. § 52.006(a); TEX.R.APP.P. 24.2(a)(1); and (B) must not exceed the lesser of: (1) 50 percent of the judgment debtor’s net worth; or (2) \$25 million. TEX.CIV.PRAC.&REM.CODE ANN. § 52.006(b); TEX.R.APP.P. 24.2(a)(1)(A), (B).

A. *What constitutes compensatory damages under the supersedeas statute?*

Three times in the last three years, the Texas Supreme Court has addressed whether a judgment award constitutes “compensatory damages” under the supersedeas statute.

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