

NAVIGATING SUPERSEDEAS IN TEXAS AND FEDERAL COURTS

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CHAPTER 19

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Navigating Supersedeas in Texas and Federal Courts

I. INTRODUCTION

If your appellate practice involves cases in both Texas state courts and federal courts in Texas, you know that distinct differences exist between the two procedural schemes, including post-trial practice. Although the seasoned practitioner will master the nuances of the differences over time, these schemes are not static. It is always helpful to brush up on some of the procedural distinctions that you will encounter. One aspect of post-trial, pre-appeal practice is suspending enforcement of the judgment during appeal. This article will address the primary features and distinctions of superseding a judgment under both the Texas and federal schemes, focusing on superseding monetary judgments by filing a supersedeas bond.¹

II. APPLICABLE RULES AND STATUTES

A. Texas

The primary sources for Texas supersedeas law are Chapter 52 of the Texas Civil Practices and Remedies Code and Rule 24 of the Texas Rules of Appellate Procedure, along with case law interpreting and applying these provisions. Chapter 52 primarily provides the amount required to supersede a judgment, including what portion of the sums awarded in the judgment that must be superseded, caps on the amount of the bond, and the standards for superseding less than the required amount. TEX. CIV. PRAC. & REM. CODE § 52.006. Rule 24 contains these same provisions along with rules regarding all aspects of superseding a judgment and challenging the amount of security and the sufficiency of the sureties in the trial and appellate courts. To the extent there is any conflict between Chapter 52 and Rule 24, Chapter 52 controls. *Id.* § 52.005(a).

B. Federal

In federal courts, the primary federal rules addressing supersedeas bonds are Rule 62 of the Federal Rules of Civil Procedure and Rule 8 of the Federal Rules of Appellate Procedure. Rule 62 is the principal rule governing the timing and manner of suspending execution of a judgment. It provides for stays of execution as to nearly all types of judgments and

contains rules demonstrating the breadth of discretion federal district and appellate courts have to suspend execution. FED. R. CIV. P. 62.

Rule 62(a)-(d) was substantially rewritten and reorganized by amendments effective December 1, 2018. In Rule 62(a), the period of automatic stays is expanded to 30 days, from 14 days, and it expressly recognizes the court's authority to dissolve an automatic stay or supersede it by a court-ordered stay. Rule 62(b) contains the supersedeas-bond provisions of former Rule 62(d), but has been modified to authorize (1) a stay at any time after judgment is entered, not solely on appeal; and (2) the posting of security in a form other than a supersedeas bond.

Appellate Rule 8 grants federal courts of appeals the power to issue stays and injunctions to preserve their jurisdiction or protect the right of appealing parties, although this relief must ordinarily be sought first in the district court. FED. R. APP. 8.

Rule 62(f). As discussed below, the length of the stay of execution—and hence the time period to supersede the judgment—as well as the amount of security required to suspend execution, differs dramatically between the Texas and federal schemes. But a party superseding a federal-court judgment may be entitled to the same stay of execution afforded under Texas law if Federal Rule of Civil Procedure 62(f) applies. Under Rule 62(f), *if* a judgment constitutes a lien on the judgment debtor's property under Texas law, "the judgment debtor is entitled to the same stay of execution the state court would give." FED. R. CIV. P. 62(f). Whether or not Rule 62(f) applies to judgments in federal courts located in Texas is addressed in Section XIII.

Accordingly, the comparisons between the Texas and federal schemes addressed in the following sections will be presented as if Rule 62(f) does *not* apply.

III. WHEN TO SUPERSEDE THE JUDGMENT

Under both Texas and federal law, a party is not required to supersede a judgment in order to appeal. *See* TEX. R. APP. P. 24.1(a); *Hawaiian Paradise Park Corp. v. Friendly Broad. Co.* 414 F.2d 750, 752 (9th Cir. 1969). But the judgment creditor may enforce or execute on the judgment during the appeal if the judgment is not superseded. Execution on the judgment, however, does not moot the appeal. *See Miga v. Jensen*, 96 S.W.3d 207, 211-12 (Tex. 2002); FED. R. APP. P. 3(a)(2). The timing

Supersedeas, pp. 183-209 (Robert Dubose, ed., ALM 2019); SUPERSEDING AND STAYING JUDGMENTS: A NATIONAL COMPENDIUM, Ch. 1 (Federal Courts), 46 (Texas) (Roger Townsend, ed., ABA TIPS 2007); Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments on Appeal After House Bill 4*, 46 S. TEX. L. REV. 1035 (2005).

¹ This article substantively updates an article Charlie Frazier wrote and presented at the 2014 State Bar of Texas Advanced Civil Appellate Practice Course, Supersedeas—A Texas and Federal Comparison. Several sources exist for a more in-depth discussion of state and federal supersedeas practice, procedure, and jurisprudence. *See* TEXAS PRACTITIONER'S GUIDE TO CIVIL APPEALS, *Stays and*

of superseding the judgment is largely dictated by the timetable for execution.

A. Texas

A judgment creditor may not execute on a final judgment until 30 days after it is signed, or 30 days after a timely motion for new trial is overruled. TEX. R. CIV. P. 627.² A timely filed motion to modify the judgment does *not* extend the date on which a party may execute on the judgment.

A judgment creditor may begin efforts to collect (but not actually execute) on a judgment immediately after it is signed. A judgment creditor may obtain a writ of garnishment immediately after the judgment is signed unless a proper supersedeas bond is filed. *Id.* 657; *see* TEX. CIV. PRAC. & REM. CODE § 63.001(3). In some cases, the trial court may issue a turnover order immediately after the judgment is signed. TEX. CIV. PRAC. & REM. CODE § 31.002(b)(1). Therefore, the deadline to suspend these collection efforts begins when the judgment is signed. *See Hood v. Amarillo Nat'l Bank*, 815 S.W.2d 545, 548 (Tex. 1991) (on motion for reh'g) (per curiam).

Although only judgments and appealable orders that are the subject of an actual pending appeal may be superseded, a party may post supersedeas at any time after the judgment is signed. Of course, if the judgment debtor does not perfect an appeal during the time period for perfecting an appeal, enforcement or execution of a judgment may not be stayed.

B. Federal

Automatic 30-day stay. Under Federal Rule of Civil Procedure 62(a), execution on a judgment is automatically stayed for 30 days in most cases. FED. R. CIV. P. 62(a). Expressly excepted from the automatic stay are injunctions, receivership actions, and patent-accounting actions. *Id.* In these types of cases, the district court must exercise its discretion to grant a stay; otherwise, the prevailing party may immediately begin enforcement of the judgment upon its entry. So unless the judgment debtor obtains a discretionary stay or extension of the automatic stay, as discussed below, a judgment debtor must file a supersedeas bond or other proper security and obtain approval of the security by the court within the 30-day time period to avoid enforcement of the judgment.

Post-trial motions. Note that the filing of post-trial motions that extend the deadline to file the notice of appeal³—e.g., motions for new trial, motions for judgment as a matter of law, and motions to alter or

amend the judgment under Rules 50 and 59—do *not* extend the automatic stay. Instead, the district court has discretion “to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending.” FED. R. CIV. P. 62(g)(1). Otherwise, the stay will expire after the 30-day period. The court may also extend the automatic stay upon the parties’ agreement, even after the court has ruled on post-judgment motions. To obtain such an extension, the parties should file a joint motion to extend the automatic stay.

A notice of appeal is no longer a prerequisite. Before the 2018 amendments, Rule 62(d) provided that “[t]he [supersedeas] bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal.” Many courts construed this language as requiring a party to file a notice of appeal before the court could approve the party’s supersedeas bond. *E.g., Tricon Energy, Ltd. v. Vinmar Int'l, Ltd.*, No. 4:10-05260, 2012 WL 527965, *1 (S.D. Tex. Feb. 16, 2012).

Under the 2018 amendments, a “party” may file a supersedeas bond or other security to stay enforcement of the judgment “[a]t any time after judgment is entered...” FED. R. CIV. P. 62(b). Rule 62(b) advisory committee’s notes to the 2018 amendment observed that “a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.” *Fessler v. Porcelana Corona de Mexico*, Nos. 4:19-CV-00248, 4:17-CV-0001, 2020 WL 3498872, at *2 n.3 (E.D. Tex. June 29, 2020) (mem. op.).

IV. DISCRETIONARY STAYS OF EXECUTION

Not every judgment or order may be superseded as a matter of right by posting a bond—trial courts under both schemes have discretion to stay execution in certain circumstances.

A. Texas

Interlocutory orders. Under Rule 29.2, a “trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order. . . .” TEX. R. APP. P. 29.2. If that occurs, the party may supersede the order in the same manner as a final judgment. *Id.* Under Rule 24.2(a)(3), the trial court also may allow a counter-supersedeas bond to prohibit superseding the interlocutory order. *Id.* 24.2(a)(3); *see Five Star Glob., LLC v. Hulme*, No. 05-20-00940-CV, 2021 WL 791426, at *2-4 (Tex. App.—Dallas Mar. 2, 2021, no pet.) (mem. op. on motion to review counter

² Execution does not issue for an interlocutory order. Where there is a question about finality of a judgment, one factor courts consider is whether the order contains language

ordering execution to issue. *See Estate of Brazda*, 582 S.W.3d 717, 728-30 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

³ *See* FED. R. APP. P. 4(a)(4)(A).

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