

A SUPERSEDEAS CHECKLIST

Steps for preventing execution on a judgment pending appeal.

WRITTEN BY CHARLIE FRAZIER

Supersedeas practice in Texas is challenging for inexperienced and seasoned practitioners alike. It is replete with precise procedural requirements, tight time periods, complex determinations of the required security amount, and diverse methods for staying enforcement. The goal of this article is to help clarify Texas supersedeas practice by providing (1) practical considerations before and throughout the process of superseding a judgment and (2) a step-by-step guide for navigating the procedural and substantive requirements, with an emphasis on supersedeas bonds.¹

A. Preliminary Considerations

1. It is not too early to consider *before* trial what your client would need to do to stay enforcement of a potential adverse judgment. Waiting until the judgment will put your client at a disadvantage—some collection efforts can begin immediately after the judgment is signed, and substantial time and effort are often required to supersede a judgment.
2. If planning to supersede with a supersedeas bond, contact a reputable bond broker to begin the process of obtaining a bond as soon as possible. One source is the National Association of Surety Bond Producers, a national trade association of surety brokers and producers.²
3. In the event of an adverse final judgment or appealable order, confirm that your client desires to appeal.
4. Seek and obtain a Rule 11 agreement with opposing counsel not to attempt collection efforts or execution on the judgment during the time needed to supersede the judgment.
5. Calculate the amount of security required to stay execution.³
 - a. Attorneys' fees incurred in the prosecution or defense of a claim are not compensatory damages or costs and therefore do not need to be superseded.⁴
 - b. But if attorneys' fees are an *element of damages*—e.g., a breach-of-contract claim for unpaid attorneys' fees—they are compensatory and must be superseded.⁵
 - c. Prejudgment interest generally does not need to be superseded.⁶
6. Evaluate the feasibility of the various available methods to supersede, one of which includes the parties entering a written agreement to suspend enforcement of the judgment during the appeal, which must be filed with the trial court.⁷
7. If your client chooses to supersede by filing a bond or a deposit in lieu of bond, contact the clerk's office well before you plan to file the instrument to determine:
 - a. the name and location of the person who has the responsibility of approving bonds or deposits;
 - b. whether there are formal or informal "rules" or unique procedures the clerk's office follows regarding:
 - i. the wording on the instrument;
 - ii. the amount of required security;
 - iii. the term of post-judgment interest—e.g., one year, 18 months, or two years; and
 - c. whether the original bond or notice of deposit must be:
 - i. physically presented to the clerk for approval, upon which the approved bond or notice of deposit will be filed;
 - ii. efiled, upon which the clerk will review for approval and sign electronically or physically upon approval; or
 - iii. both i and ii;
 - d. if superseding with a bond, whether that surety is approved by the clerk for the amount of required security; and
 - e. if superseding by deposit, what types of negotiable instruments the clerk accepts and, if the deposit will be by check, whether the clerk requires a certified check.

B. Net-Worth Issues

1. If superseding a money judgment, ask your client if it believes the amount of required security exceeds 50% of its current net worth.⁸
2. If it will, or might, have the client:
 - a. gather its current financials, preferably audited financials;
 - b. make a list of current assets and liabilities; and

- c. secure accounting expertise to calculate net worth under the Generally Accepted Accounting Principles, or GAAP.
3. If the amount of security will be based on the client's current net worth:
 - a. assist the client and accountant to ensure the net-worth affidavit complies with Texas Rule of Appellate Procedure 24.2(c)(1);
 - b. ensure the necessary supporting documentation is attached to the affidavit;
 - c. determine if the client wants the court to seal the record containing the net-worth information; if so, pursue a court order and a protective order or confidentiality agreement with the judgment creditor;
 - d. post the amount of security based on net worth and file a motion to order security based on net worth, with the affidavit attached;⁹
 - e. secure a hearing as soon as possible;
 - f. prepare to respond to net-worth discovery from the judgment creditor;
 - g. ensure the hearing is on the record;
 - h. ensure the court's order specifically states the debtor's net worth and provides with particularity the factual basis for its determination;
 - i. if the court denies the motion, evaluate the merits of seeking appellate review under TRAP 24.4;¹⁰ and
 - j. if you seek review, obtain a stay of execution during the appellate process in either the trial court or appellate court.

C. Substantial Economic Harm Issues

1. Ask the client if posting the required security amount will "likely to cause [it] substantial economic harm," obtaining evidence regarding the factors courts consider in determining whether substantial economic harm is likely.¹¹
2. Use the assistance of accounting or economic experts, if possible.
3. Ask the client to identify all competent witnesses regarding the harm the client will likely suffer if the full amount of security is posted.
4. If the standard can be met:

- a. prepare and file a motion to reduce the amount of required security;
- b. set the motion for the mandatory hearing (on the record) as soon as possible;
- c. ensure the court's order complies with Rule 24.2(b);
- d. if the court denies the motion, evaluate the merits of seeking appellate review under Rule 24.4; and
- e. if seeking review, obtain a stay of execution during the appellate process.

D. Supersedeas Bonds

1. Determine whether the client has a relationship with a surety.
2. If not, use a surety bond broker to assist in finding a sufficient surety, after informing the broker as to the bond amount.
3. Once a surety is proposed:
 - a. explore whether the surety will require collateral, and if so, the type and amount (liquid collateral in the full bond amount is usually required); and
 - b. contact the appropriate department at the courthouse to confirm the surety is approved for the bond amount.
4. Craft the proper language for the bond.
 - a. Set out the amount (and how it was calculated) of:
 - i. the principal amount;
 - ii. pre-judgment interest; and
 - iii. post-judgment interest, the rate, and term.
 - b. Specify the aggregate amount of the bond and that the surety and principal (judgment debtor) are liable for the aggregate amount and no more.
 - c. Specify the required conditions that must be met before the surety is liable directly to the judgment creditor for the bond amount:
 - i. if 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;
 - ii. if the debtor does not perform an adverse judgment final on appeal; or

- iii. where the judgment is for the recovery of an interest in real or personal property, if the debtor does not pay the creditor the value of the property interest's rent or revenue during the appeal.¹²
- 5. Obtain approval of the bond according to the procedures followed by the clerk in the county of suit.
 - a. If you are not required to efile the bond, it is better to have the bond personally “walked” through the approval process at the clerk’s office so you or someone can:
 - i. observe the clerk signing the bond as approved; and
 - ii. ensure the bond is filed and obtain a file-marked copy.

E. Deposits in Lieu of Bond

1. If superseding with a deposit, draft a notice of filing deposit in lieu of bond:¹³
 - a. setting out the calculations provided above for bonds;
 - b. setting out the conditioning language above for bonds; and
 - c. requesting the clerk to place the deposit in an interest-bearing account, if available.
2. If available, prepare an order for the court to place the funds in an interest-bearing account.
3. If permitted, have the deposit¹⁴ personally remitted and have the notice and order filed to ensure the clerk approves the amount and provides the order to the court for signing.
4. Obtain a receipt for the deposit.

F. Non-Monetary Judgments

1. Assist your client to determine:
 - a. the value of the rent or revenue of the client’s property interest if the judgment is for the recovery of an interest in real property;¹⁵
 - b. the value of the property interest as of the date of judgment if the judgment is for the recovery of personal property;¹⁶ and
 - c. the amount of security that will adequately protect the judgment creditor against loss or damage that the appeal might cause, if the judgment is for something other than money or interest in property.¹⁷
2. Gather documentary support and identify any persons with personal knowledge of the foregoing values.

3. File a motion to determine the amount of security required as soon as possible and request a hearing.
4. Present evidence on the record of the foregoing values.
5. Obtain a written order finding the values and the amount of security required.¹⁸
6. If dissatisfied, proceed with appellate review.

G. Once the Appeal Is Final

1. If the judgment is *reversed*:¹⁹
 - a. When the mandate is issued, file a motion in the trial court to release the supersedeas bond or deposit.²⁰
 - b. Prepare an agreed order stating:
 - i. the bond is released;
 - ii. the surety and principal are discharged and released from any obligations under the bond; and
 - iii. the court clerk is to return the original bond to the attorney for the judgment debtor (some sureties require the original bond before remitting the balance of the premium for the remaining bond term).²¹
2. If the judgment is *affirmed*:²²
 - a. advise opposing counsel that your client will perform the judgment, to dissuade them from attempting to execute on the bond;
 - b. alternatively, attempt to settle and compromise the amount of judgment instead of providing full performance (there may be some ambiguity on what “full performance” is, values of non-monetary judgments may have changed, and it may be more convenient for the judgment creditor); and
 - c. once performance or settlement occurs, proceed with a motion to release the bond or deposit.

H. Conclusion

Becoming familiar with Texas supersedeas law will enable you to help your client more quickly and effectively protect its assets from execution during the appeal. For example, although a judgment creditor may not actually execute on a final judgment until 30 days after it is signed (or 30 days after a timely motion for new trial is overruled), it can initiate garnishment and turnover proceedings immediately after the judgment is signed.²³ Thus, your client should supersede the judgment promptly to avoid a potential writ of garnishment or turnover order.²⁴ **TBJ**

NOTES

- For an in-depth discussion on Texas supersedeas law and procedure, see *Texas Practitioner's Guide to Civil Appeals*, Chapter 8: Stays and Supersedeas, pp. 183-209 (Robert Dubose, ed., ALM 2019).
- Their website is www.nasbp.org. Click on the tab "Find a Producer," which is listed on the left side of the homepage, and type in the required information. For purposes of superseding judgments in Texas, "net worth" "is the difference between total assets and total liabilities determined in accordance with GAAP [generally accepted accounting principles]." See *Ramco Oil & Gas, Ltd. v. Anglo Dutch* (Tenge) LLC, 171 S.W.3d 905, 915 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
- Tex. R. App. P. 24.2(a)(1). The amount of security for a money judgment must include: (1) the amount of compensatory—but not punitive—damages; (2) interest for the estimated duration of the appeal; and (3) costs.
- In re Nalle Plastics Fam. Ltd. P'ship*, 406 S.W.3d 168, 174 (Tex. 2013).
- Id.* at 174-75.
- Id.* at 173.
- Tex. R. App. P. 24.1(a)(1); see also Tex. R. App. P. 24.1(a)-(c).
- Tex. R. App. P. 24.2(a)(1). The required amount of security for a monetary judgment must not exceed the lesser of (a) 50% of the judgment debtor's current net worth or (b) \$25 million.
- Tex. R. App. P. 24.2(c)(1). When posting security based on net worth, the party "must simultaneously file . . . an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained."
- Tex. R. App. P. 24.4(a). A party may challenge a trial court's supersedeas order by filing a motion "in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case." Therefore, the motion may be filed before the appeal has been docketed in the court of appeals. A party may seek mandamus review of the court of appeals' ruling on the motion in the Supreme Court of Texas. See *Id.*
- Tex. R. App. P. 24.2(b). The trial court is required to order a reduced amount of security if the amount otherwise required by Rule 24 will cause the judgment debtor "substantial economic harm." For the factors courts consider in determining "substantial economic harm," see *Ramco Oil*, 171 S.W.3d at 917.
- See Tex. R. App. P. 24.1(d).
- See Tex. R. App. P. 24.1(c).
- The negotiable instrument must be filed with the clerk. A letter of credit generally does not qualify as a proper negotiable obligation under Rule 24.1(a)(3); see *Heritage Hous. Corp. v. Ferguson*, 651 S.W.2d 272, 273 (Tex. App.—Dallas 1983, no writ) (per curiam); see also *Lesikar v. Rappoport*, 104 S.W.3d 310, 312 (Tex. App.—Texarkana 2003, pet. denied) (noting judgment was superseded by letter of credit). A negotiable certificate of deposit may qualify. See *Su. States Gen. Corp. v. McKenzie*, 658 S.W.2d 850, 852 (Tex. App.—Dallas 1983, writ dismissed w.o.).
- Tex. R. App. P. 24.2(a)(2)(A).
- Tex. R. App. P. 24.2(a)(2)(B).
- Tex. R. App. P. 24.2(a)(3). Examples of a judgment falling under Rule 24.2(a)(3) are

- injunctions and judgments for specific performance. For a recent case addressing the adequacy of alternate security to supersede a permanent injunction, see *Mendell v. Scott*, No. 01-20-00578-CV, 2022 WL 2951666 (Tex. App.—Houston [1st Dist.] July 26, 2022, order) (mem. op.). Ironically, Rule 24.2(a)(3) permits the judgment creditor "to post[] security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if" that relief is ultimately held to be improper.
- Tex. R. App. P. 24.2(a)(3). Upon a judgment debtor's request, a trial court is required to set a supersedeas amount when the judgment is for something other than money or an interest in property.
 - If the trial court's judgment is either reversed, vacated, or rendered in favor of the judgment debtor, the surety has no obligation. The bond will be released and the surety discharged. A reversal and remand for new trial has the same effect.
 - Tex. R. App. P. 51.1(b), 65.2. Generally, enforcement cannot occur until the appeal has concluded and the mandate has issued.
 - Some clerk's offices do not permit releasing the original supersedeas bond on the ground that the bond is part of the court's file and cannot be removed. In that instance, advise the surety of this fact and inquire if the surety requires something in writing from the clerk or anything else beyond the court's order releasing the surety's (and principal's) liability under the bond.
 - Tex. R. App. P. 43.5 provides that, upon affirmance, the court of appeals "must render judgment against the sureties on the appellant's supersedeas bond . . . for the performance of the judgment and for any costs taxed against the appellant." If the court of appeals' judgment does not contain this language, the prevailing party may file a motion requesting the court to modify the judgment accordingly.
 - See Tex. R. Civ. P. 657; see also Tex. Civ. Prac. & Rem. Code §§ 31.002(b)(1), 63.001(3).
 - Tex. R. App. P. 24.1(f). Enforcement actions begun before a judgment is superseded must cease once the judgment is superseded. If a writ of execution has been issued, the court clerk must immediately issue a writ of supersedeas once proper security is made. *Id.*



CHARLIE FRAZIER

is a partner in the Dallas office of Alexander Dubose & Jefferson, an appellate boutique. He is certified in civil appellate law by the Texas Board of Legal Specialization and has over 34 years of experience in assisting trial counsel with legal issues during all stages of litigation and handling appeals in state and federal courts. Frazier's experience includes successfully arguing before the U.S. Supreme Court. He has extensively written and spoken on the law and practice of superseding state and federal judgments.

TBJ
GO TO TEXASBAR.COM/TBJARCHIVES

ACCESS ANY
TBJ ARTICLE

The State Bar of Texas and HeinOnline provide the complete TBJ archive dating back to 1938.
Take advantage of this free service.

LEGAL VENDORS

FIND THE RIGHT PROVIDER
TO KEEP YOUR PRACTICE
THRIVING.

TEXASBAR.COM/LEGALVENDORS