# PROTECTING YOUR INSURED FROM ENFORCEMENT OF A JUDGMENT DURING AN APPEAL

**WADE C. CROSNOE**
**Telephone: (512) 703-5078**
**Email: wcrosnoe@thompsoncoe.com**

**6th Annual Seminar**
**Texas Insurance Law Developments**
**October 12, 2006**

**THOMPSON COE**

## I. INTRODUCTION

This paper is a product of my experience working on Texas state court appeals for insurance companies, either as their coverage counsel or as appellate counsel for their insureds. The paper discusses: (1) the recently-revised requirements under Texas law for suspending execution of a judgment during an appeal; (2) a liability insurer's duties with respect to appealing and superseding adverse judgments against an insured; (3) the dilemma for liability insurers when faced with an insured's demand that the insurer appeal and supersede an adverse judgment that may not be covered; and (4) some possible solutions to that dilemma.

## II. WHEN EXECUTION ON A JUDGMENT DEBTOR'S ASSETS CAN BEGIN

When handling a claim against an insured or the company that goes to litigation, the possibility of an adverse monetary judgment that will need to be superseded pending appeal must always be kept in mind. One question that inevitably arises after an adverse judgment is: When is the deadline to post a supersedeas bond or other security necessary to suspend execution on the judgment during an appeal? However, the rule governing suspension of enforcement on a judgment does not state a deadline for superseding the judgment; it only states that enforcement proceedings begun before the judgment is superseded must cease once the judgment is superseded. *See* TEX. R. APP. P. 24.1(f).

Thus, the more relevant question is: When can a judgment debtor begin executing on a judgment debtor's assets? The answer is generally thirty days after the judgment is signed.[1] *See* TEX. R. CIV. P. 627. But when a timely motion for new trial is filed, execution generally cannot begin until thirty days after the motion is overruled by written order or by operation of law. *Id.* Although Rule 627 provides some breathing room for defendants who suffer an adverse judgment, other adverse consequences can precede execution on the judgment. For instance, the plaintiff can perfect a judgment lien on the judgment debtor's real property in a county by preparing an abstract of the judgment and recording it with the county clerk at any time after the judgment is signed. *See* TEX. PROP. CODE §§ 52.001-52.004. Such a lien will effectively prevent a sale or encumbrance of the property. And the plaintiff can begin conducting post-judgment discovery on the defendant's assets immediately. To prevent the plaintiff from taking these steps, it may be necessary to post a supersedeas bond sooner than thirty days after the judgment or the overruling of a motion for new trial.

## III. THE AMOUNT OF SECURITY REQUIRED TO SUSPEND EXECUTION ON A JUDGMENT PENDING APPEAL

A judgment debtor may generally suspend execution on a judgment pending an appeal by posting a supersedeas bond or other security in lieu thereof[2] with the trial court. The bond or other security typically must equal the sum of compensatory damages awarded, interest for the estimated duration of the appeal, and costs awarded in the judgment. *See* TEX. CIV. PRAC. &

[1] Execution can begin sooner if the plaintiff files an affidavit asserting that the defendant is about to remove his or her property from the county or transfer or secrete personal property for the purpose of defrauding creditors. *See* TEX. R. CIV. P. 628.

[2] In lieu of filing a supersedeas bond, a party can suspend enforcement of a judgment by filing with the trial court clerk a written agreement with the judgment creditor for suspending execution, a deposit (cash or certain cashier's checks or negotiable instruments), or alternate security ordered by the court. TEX. R. APP. P. 24.1(a).

REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1). Prior to recent legislative changes to the governing statute, defendants generally could not post a supersedeas bond in less than the full judgment amount. Under this prior law, one Texas court held that a liability insurer could not post a partial bond for an insured even though the full judgment amount exceeded policy limits. *See Haney Elec. Co. v. Hurst*, 608 S.W.2d 355, 356 (Tex. Civ. App.—Dallas 1980, order).

Fortunately, the Texas Legislature recently made it easier for defendants to suspend execution of the judgment. For instance, the amount of a supersedeas bond or other security for a money judgment may no longer exceed the lesser of (a) fifty percent of the judgment debtor's current net worth[3] or (b) $25 million. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a) and (b); TEX. R. APP. P. 24.2(a)(1). Additionally, the trial court must lower the amount of security to an amount that will not cause the judgment debtor substantial economic harm if, after notice to all parties and a hearing, the court finds that posting a bond or other security in the required amount is likely to cause the judgment debtor substantial economic harm.[4] *See* TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(b). A defendant with a small or negative net worth may be able to use these new rules to get the amount of the bond reduced to the amount of its insurance coverage or even less.

## IV. DOES A LIABILITY INSURER HAVE A DUTY TO APPEAL OR SUPERSEDE A JUDGMENT AGAINST ITS INSURED?

### A. The Duty to Appeal

Two issues that often arise following an adverse judgment against an insured are whether the liability insurer has (1) a duty to appeal or (2) a duty to furnish and pay the premiums for a supersedeas bond to suspend execution of the judgment pending appeal. Liability policies typically do not expressly state whether the duty to defend includes a duty to appeal. Only one Texas court has addressed this issue. *See Waffle House, Inc. v. Travelers Indemn. Co.*, 114 S.W.3d 601, 611 (Tex. App.—Fort Worth 2003, pet. denied). In that case, after concluding that Travelers had a duty to defend the Waffle House in an underlying lawsuit, the court of appeals noted that the policy stated the duty to defend would not end until the applicable policy limits were exhausted. *Id.* Because the policy described no other situation in which the duty to defend would expire, the court held that the duty to defend continued through the appellate process until the applicable policy limits were exhausted. *Id.*

Although the *Waffle House* opinion appears to impose a broad duty to appeal, it is unclear whether other Texas courts would follow suit. Outside of Texas only one court has recognized a similarly broad duty to appeal. *See Palmer v. Pacific Indemn. Co.*, 74 Mich. App. 259, 254 N.W.2d 52 (1977). Furthermore, it appears from the *Waffle House* opinion that Travelers simply argued that it had no duty to defend in the first instance, as opposed to contesting (1) whether it also would have a duty to appeal if it had a duty to defend or (2) what the scope of the duty to appeal would be. However, courts outside of Texas have addressed these issues.

---

[3] Among the unresolved issues concerning this new law are how to define "net worth," whether liability insurance should count as an asset, and whether the adverse judgment itself counts as a liability.

[4] Prior to these legislative changes in 2003, a judgment debtor generally was required to provide security for the entire amount of the judgment, without any cap on the amount of security, and the trial court was required to consider potential harm to the judgment creditor when determining whether to reduce the amount of security.

Several courts outside of Texas have held that an insurer has a duty to appeal a judgment covered by its policy, but only when reasonable grounds for appeal exist and the interests of the insured will be served by an appeal. *See Chrestman v. United States Fid. & Guar. Co.*, 511 F.2d 129 (5th Cir. 1975); *Cathay Mortuary, Inc. v. United Pacific Ins. Co.*, 582 F. Supp. 650 (N.D. Cal. 1984); *Jenkins v. Ins. Co. of N. Am.*, 220 Cal. App. 3d 1481 (1990); *Aetna Ins. Co. v. Borrell-Bigby Elec. Co.*, 541 So.2d 139 (Fla. Ct. App. 1989); *Ursprung v. Safeco Ins. Co. of Am.*, 497 S.W.2d 726 (Ky. 1973); *Reichert v. Continental Ins. Co.*, 290 So.2d 730 (La. Ct. App. 1974); *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1169 (Haw. 1999); *Truck Ins. Exch. v. Century Indemn. Co.*, 76 Wash. App. 527, 887 P.2d 455 (1995).

Other courts have concluded that the test for the duty to appeal is one of good faith and fair dealing by the insurer. *See Guar. Abstract and Title Co. v. Interstate Fire and Cas. Co.*, 228 Kan. 532, 618 P.2d 1195 (1980); *Hawkeye-Security Ins. Co. v. Indemn. Co. of N. Am.*, 260 F.2d 361 (10th Cir. 1958). This appears to be quite similar to the reasonableness test identified in *Chrestman* and the other cases discussed above.

In determining whether a reasonable basis for appeal exists, courts often focus on the advice the insurer receives from counsel. One court has held that an insurer has an absolute duty to appeal when reputable counsel gives cogent reasons for appeal. *See Reichert*, 290 So.2d at 733. In that case, however, both the insurer's and insured's counsel recommended an appeal. *Id.* at 732. The court did not specify whether a recommendation by insured's counsel is sufficient to invoke the duty to appeal, but did emphasize that the insurer's counsel also recommended an appeal. *Id.* at 733. When an insurer's own counsel recommends an appeal, courts have held that a duty to appeal exists. *See Jenkins*, 220 Cal. App. 3d at 1491 (insurer's attorney's statement that the court's rulings provided grounds for appeal supported a bad faith finding for the insurer's failure to appeal); *Borrell-Bigby Elec. Co.*, 541 So.2d at 139-41. On the other hand, one court has held that an insurer's failure to follow advice from the insured's defense counsel to appeal is not alone sufficient to support a finding of bad faith. *See Hawkeye-Security Ins. Co.*, 260 F.2d at 363. Most courts have held that the ultimate result on appeal is not determinative of whether reasonable grounds for appeal existed, although the appeal's outcome could obviously play some role in a hindsight determination of the reasonableness of the insurer's action. *See Reichert*, 290 So.2d at 730.

When a duty to appeal exists, it may apply even when only a small portion of the judgment is covered by the policy. *See, e.g., Cathay Mortuary, Inc.*, 582 F. Supp. at 659. Moreover, even if the trial court dismisses the only covered claim, the duty to defend can continue through the appellate process until the claimant has no further right to appeal the dismissal of an arguably covered claim. *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 417 (Minn. 1997). The duty to appeal has even been held to exist when an insurer tenders its policy limits in partial satisfaction of a judgment, so long as reasonable grounds to appeal are present. *See Upsprung*, 497 S.W.2d at 726.

### B. The Duty to Supersede

#### *1. The Case Law*

Liability policies typically require insurers to pay the premiums for "bonds" or "bonds to release attachments" or even "appeal bonds," but do not expressly require the insurer to furnish

those bonds. It appears that no Texas court has addressed the meaning of such provisions. Outside Texas, one court has held that an insurer has a duty to post a supersedeas bond on behalf of its insured, although the duty does not require the insurer to pay premiums to bond the entire judgment when the judgment is in excess of policy limits. *See Bowen v. Gov't Employees Ins. Co.*, 451 So.2d 1196, 1198 (La. Ct. App. 1984). That court further held that the insurer's duty of good faith requires it to assist the insured in attempting to arrange a bond for the amount of the judgment in excess of the policy limits. *Id.*

Another court has assumed, without deciding, that an insurer has a duty to post a supersedeas bond. *See Continental Cas. Co. v. Kinsey*, 513 N.W.2d 66, 70 (N.D. 1994). However, the insured is not entitled to recover damages for an insurer's failure to post a bond if the insured is unsuccessful on appeal and it is ultimately determined that the judgment is not covered. *Id.* A third court has held that language in a liability policy requiring the insurer to pay premiums on appeal bonds obligated the insurer to pay premiums to bond the entire judgment, even though the judgment was in excess of policy limits. *See Burford Equip. Co. v. Centennial Ins. Co.*, 857 F. Supp. 1499, 1504 (N.D. Ala. 1994). But the court did not address whether the insurer was required to furnish the bond.

On the other hand, one court has held that an insurer did not act in bad faith in declining to post a supersedeas bond on behalf of an insured, even though the insurer elected to appeal the judgment and its general counsel testified that the insurer was required to furnish the bond. *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 658 (Iowa 2002). The Iowa Supreme Court reasoned that the policy language made it clear that the decision whether to furnish a bond was discretionary (the policy stated the insurer was not obligated to furnish the bond) and that the insurer had good faith doubts about coverage. *Id.*

*2. The Dilemma*

Although the typical language in liability policies states that the insurer is not obligated to furnish a bond, there are cases from other jurisdictions to the contrary. Given the lack of Texas precedent on this issue, it is an open question whether a liability insurer is obligated to furnish a supersedeas bond, or only to pay premiums on the bond. This issue can be of critical importance, especially when there are unresolved coverage disputes concerning some or all of the judgment. In such situations, the insurer will be faced with three unenviable choices: (1) denying coverage for the judgment and facing extracontractual exposure if its denial is found to be improper; (2) taking the position that its policy does not require it to furnish the bond and facing extracontractual exposure if that position is subsequently determined to be erroneous; or (3) furnishing a bond for a judgment that may not be covered. The third alterative is particularly troublesome because it will typically entail the insurer's promise to indemnify the surety if the surety is ultimately liable under the bond, a promise that will not be relieved by a subsequent ruling that the judgment is not covered.

*3. Possible Solutions to the Dilemma*

Texas case law suggests two possible solutions to this dilemma. First, the Supreme Court of Texas has repeatedly emphasized the importance of liability insurers making a good faith effort to obtain a judicial resolution of coverage issues before the underlying liability suit is tried. *See, e.g., Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997); *State*

*Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996). But there are two problems with the court's suggestion. First, it is not always possible to obtain a judicial resolution of the coverage issues before trial of the liability suit, either because the coverage issues do not arise until shortly before trial or because of delays in filing a declaratory judgment action or obtaining the court's ruling in that action.

Second, the court in the declaratory judgment action may be precluded from ruling on the duty to indemnify until after the liability suit is tried. The Supreme Court of Texas held in *Griffin* that a Texas court may rule on the duty to indemnify before judgment is rendered in the liability suit, and gave as an example a situation in which the same reasons that negate the duty to defend likewise negate any possibility of a duty to indemnify. *Griffin*, 955 S.W.2d at 84. The court noted, however, that resolution of the duty to indemnify must be deferred when that duty turns on the facts actually proven at trial in the liability suit. *Id.* Since the duty to indemnify will often turn on the facts proven in the liability trial, it is not always possible to obtain a judicial determination of the coverage issues before trial of the liability suit.

So, what can a liability insurer do if it cannot obtain a judicial ruling on its coverage obligations before an adverse judgment is entered against its insured in the liability suit? A recent opinion by the Supreme Court of Texas arguably provides an opening for an insurer to bond the judgment and pursue a right of reimbursement from the insured for any payment made to satisfy the insurer's liability under a supersedeas bond, so long as the insurer reserves the right to do so and proves that the underlying judgment is not covered. *See Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc.*, 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (May 27, 2005) (motion for reh'g granted). In that case, the court held that a liability insurer may seek reimbursement of a settlement paid on an insured's behalf if the insurer timely reserves its right to do so, the insurer pays to settle claims that are not covered, and the insured demands that the insurer accept a settlement offer within policy limits or expressly agrees that the offer should be accepted. *Frank's Casing*, 2005 WL 1252321, at *3.

It is unclear whether the right of reimbursement described in *Frank's Casing* would apply in the supersedeas context. More importantly, however, the Supreme Court of Texas granted rehearing in *Frank's Casing* and heard argument for a second time in February of this year, following an outpouring of policyholder criticism of its initial decision. There has been considerable turnover of the court's justices since the initial decision, leading to speculation that the court's opinion on rehearing will reject or limit the right of reimbursement recognized in its initial opinion. Finally, even if the court upholds the right of reimbursement in its opinion on rehearing, that right is of little value unless the insured has the financial means to reimburse the insurer.

144256