1 SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
2 Austin, Texas 78701
May 17, 1986
3

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1 CHAIRMAN SOULES: We are going to
2 start with Proposed Rule 364-A, which that may not
3 be the best number for it, but that's the way we
4 called it so far. That information is set out at
5 Page 445. Actually, it would be a new rule. It's
6 on 446. And Hadley has had a subcommittee working
7 on this and, as you know, it is my judgment to
8 step aside while it's being debated so that there
9 wouldn't be any question about where somebody was
10 coming from.
11 So, let me turn that over. The reason I'm
12 taking this out of order is there's a TTLA meeting
13 here in Austin today where some of our members
14 need to go, and we're going to try to get this out
15 of the way within an hour, if possible. Maybe it
16 won't take that long, maybe it will take longer --
17 so that they can, when it's done, go forward to
18 their other meeting. And with that, Hadley, it's
19 your report.
20 PROFESSOR EDGAR: I wish Rusty were
21 here. Maybe he'll come in while we're talking
22 about it and I'll tell you somewhat of his
23 position in just a minute.
24 In reading the minutes of the last meeting,
25 our committee concluded that, really, what we are

1 supposed to do was to look at this rule and
2 determine whether it might be a proper rule
3 without regard to the constitutional acts that
4 might be being held over our current rule.
5 And so, in order to do that, we looked at the
6 second circuit opinion in the Pennzoil case, and
7 some of the members of this committee were very
8 helpful in providing me with information which
9 they had already obtained.
10 Luke gave me some information, Harry Reasoner
11 gave me some information, Kronzer did, Jim Sale
12 did. And we tried to compile all this
13 information, and I have it available for anybody
14 that wants to inspect it.
15 But after looking at all of this, our
16 committee was of the view that, as I stated in my
17 letter to Luke, the committee was unanimous in
18 concluding that a rule of this general nature is
19 desirable; I'm talking about Rule 364-A.
20 Now whether it takes the precise form that we
21 have it in now is something that we really didn't
22 consider because that had already gone through the
23 Committee on Administration of Justice, and I
24 thought that would be more properly the subject of
25 debate here in this committee.

1 But as far as the philosophy of allowing the
2 Court to, in certain cases, not require a
3 supersedeas bond of the type we now have, we felt
4 this was a desirable rule.
5 Now, that's basically what we have done.
6 Sam, have I correctly stated our position?
7 MR. SPARKS (EL PASO): That's right.
8 PROFESSOR EDGAR: Broadus isn't here
9 yet but he has concurred in this also.
10 Now, let me say that Rusty had some serious
11 questions about Proposed Rule 364-A. And I just
12 had an opportunity to talk to him about it very
13 briefly yesterday, and I really feel I would not
14 be doing him justice if I tried to speak for him.
15 But I just want to state that he does have some
16 question about it.
17 CHAIRMAN SOULES: Okay. Hadley is
18 going to conduct the debate if there is any debate
19 because I'll be identifying people to speak.
20 Rather, you would, so we're sure no question that
21 someone besides me has recognized all speakers who
22 care to address the issues.
23 PROFESSOR EDGAR: Is there any
24 discussion?
25 MR. MORRIS: Hadley, let me just

1 comment. I'm awfully unknowledgeable, I guess is
2 the word that's used, regarding this whole issue.
3 Could you just kind of educate me a little bit
4 about what the Court has said and what problems
5 you're trying to cure?
6 PROFESSOR EDGAR: Well, of course, the
7 origin of 364-A as you see here on Page 446 was
8 something that was in the mill long before there
9 was ever a Texaco/Pennzoil case. And this had
10 gone through the Committee on the Administration
11 of Justice, and they have proofed it and sent it
12 to us for consideration.
13 During that period, Pennzoil vs. Texaco held
14 in part that our statute as applied in that case
15 was unconstitutional. And I have a copy of the
16 opinion here if you want to take a look at it. At
17 least, that's the way we interpret it.
18 There's another kicker to that, though: that
19 the Court really spoke not only to the supersedeas
20 bond aspect, but also to the fact that once a
21 judgment is abstracted, it then becomes a debt of
22 the company.
23 And, therefore, in the Texaco case, the
24 supersedeas bond coupled with the abstract of
25 judgment, simply precluded Texaco from obtaining a

1 line of credit from anybody because they now had
2 an 11 billion dollar debt. So those coupled
3 together, the Court said, rendered the supersedeas
4 bond unconstitutional as applied in that case.
5 MR. SPARKS (EL PASO): I don't know if
6 they really said "unconstitutional." What they did
7 say was that their 1985 theory, it was a taking of
8 property without due process to execute the
9 judgment or to abstract the judgment you had to
10 use state officials, so it was under state law and
11 under the Equity Relief of 42 United States Code,
12 1985. An injunction was appropriate in this
13 case.
14 They go on to talk about a lot of big
15 numbers, which, of course, that case has. But
16 really, the logic to it, I don't think, is
17 differentiated between whether it's 11 billion
18 dollar judgment that one person or one firm has
19 trouble paying or 100 dollar judgment.
20 MR. SPARKS (SAN ANGELO): It shouldn't
21 be.
22 PROFESSOR EDGAR: That's right,
23 logically it shouldn't make any difference. And
24 also, there are, I think, approximately 35 states,
25 and I have the statutory references here if you

1 want to examine them, which have a provision
2 similar to our current rule.
3 So I guess, if our statute is
4 unconstitutional across the board, then so is
5 everybody else's. I don't know whether misery
6 loves company is a comforting thought, but any
7 how, I'll just give you that information as well.
8 But in spite of all of that, it was our
9 committee's view that we should have some
10 provision in our rule that in certain types of
11 cases the Court may do something other than
12 require a bond equal to the amount of the
13 judgment.
14 JUDGE WOOD: Let me ask you this
15 question: What would the proposed rule would do
16 under this situation? I know a case where a man
17 worth $200,000, and that's all, is being sued for
18 4 million. The plaintiff probably doesn't have
19 200,000.
20 Now, the judgment is taken for, say, 1
21 million or 500,000, or whatever it is. My man
22 simply, I say "my man", couldn't supersede it, no
23 way in the world. And, on the other hand, if he
24 doesn't, if his stuff served on his 200,000 is
25 gone in the hands of his plaintiff, and by the

1 time he reverses it, if he does, why, that's
2 gone.
3 Would this rule address that, that he ought
4 to be able to put up everything he's got and hold
5 it for a while.
6 CHAIRMAN SOULES: Yes.
7 PROFESSOR EDGAR: Well, I would think
8 so.
9 JUDGE WOOD: I would assume that's the
10 purpose of it.
11 PROFESSOR EDGAR: Yes.
12 JUDGE WOOD: But I'd be for such a
13 rule, of course.
14 MR. SPARKS (EL PASO): Well, what's
15 been happening all over the state, but I know I've
16 got six or eight cases just in our firm even
17 before Texaco, is if you get a large judgment,
18 there are two ways to do it. You can make an
19 agreement with the appellee. Now, usually when
20 the plaintiffs lose, they don't lose a million
21 dollars. When they lose, you're usually talking
22 about defendant.
23 But you can make an agreement for cash
24 consideration, or some type of thing, they'll
25 agree not to execute during the appeal. And

1 that's not really good because usually it has, at
2 least, a theoretical conflict between the party
3 and his lawyer whose getting the money or getting
4 part of it.
5 Or what has been done far more frequently in
6 large judgment cases is you go into
7 reorganization, get an injunction. And I know
8 that we had, our business lawyers had, six
9 entities including the Texas Association of
10 Realtors in a reorganization until some -- these
11 were anti-trust cases -- got included into the
12 fifth circuit.
13 All of them were reversed but none of them
14 could have been appealed. And so we find that
15 with the sophisticated client that does have a lot
16 of assets, your playing a lot of games in
17 bankruptcy. And for the nonsophisticated client
18 who doesn't have a lot of assets, they just go
19 under, and there's no relief.
20 And the federal system -- I lost a case for a
21 couple million dollars two years ago and got it
22 reversed in the fifth circuit. And I tried every
23 way in the world not to put a supersedeas. It was
24 Jefferson Standard Life Insurance Company. They
25 could have one, but the premium was $68,000 a

1 year.

2 And so they finally cut a deal by putting up

3 some security with a company and got one issued.

4 But I tried every way in the world, even to put up

5 a CD in escrow for the appellee, and they wouldn't

6 do it because, of course, they were trying to

7 negotiate a settlement. And that's not criticism,

8 they just wouldn't do it. It's just their own

9 strategy.

10 But in a federal court you can get it back.

11 I just got a check from them for $16,000 on that

12 supersedeas. But there's no relief. But the

13 relief, even if we gave relief in the State court,

14 doesn't eliminate the problem as Judge Wood is

15 saying, and it's forcing lawyers, in my judgment,

16 to play games with the bankruptcy court. There's

17 not as much tarnish because every other person is

18 in bankruptcy now anyway it seems like.

19 But you go in, you convince the judge of the

20 situation, you get a stay ordered and it just

21 remains dormant for eight months, a year, however

22 long your appeal is. Something really needs to be

23 done, I think.

24 MR. BEARD: It looks like the courts

25 are going to have to have some guidance. One of

1 the problems that the plaintiffs are going to face
2 is that anticipating an adverse judgment, the
3 defendant, one, prefers himself. He puts a lien,
4 if he's got that, to his company for his
5 corporation. He puts liens on all the property to
6 himself. He's the guarantor. He makes sure the
7 banks are covered if he hadn't up to that time.
8 And the preference time is running. So
9 without guidance to the courts, they have got a
10 lot of problems to try to face. Is the party
11 seeking this relief going to file a schedule
12 showing what preferences made within the last
13 year? It's almost like you're going to force them
14 to file a Chapter 11 or bankruptcy petition as
15 part of the proceeding, because a whole lot goes
16 on when the parties are anticipating an adverse
17 judgment.
18 MR. SPARKS (EL PASO): There's one
19 other problem, too. And that is, even if you've
20 got the money and the assets for security,
21 insurance companies don't want to sell a
22 supersedeas anymore. The judgments are getting
23 large. You've got the exemplary damage, you've
24 got judgment, prejudgment and postjudgment
25 interest. There are very few companies that would

1 write supersedeas above $500,000 now in the United
2 States.
3 MR. BEARD: We all know one of the
4 ways you settle in a case in Texas you cannot
5 collect from this defendant if you don't have an
6 insurance. So you settle or else, because we'll
7 see you never collect any money. And in Texas,
8 that's generally true; they're very difficult to
9 claim.
10 PROFESSOR EDGAR: We're talking about
11 Rule 364-A, Rusty. We just passed it. And I
12 stated that you had some concern about it.
13 CHAIRMAN SOULES: First of all, I'd
14 like to have the committee's view as to whether or
15 not David and I and Rusty should even speak to
16 this. We all have some history with it, which we
17 might want us to share. But I don't want to start
18 that unless the committee is willing. Could you
19 see that, at least, Hadley?
20 PROFESSOR EDGAR: I'm recognizing that
21 you do have a professional interest in a case
22 involving this subject. I think we can take that
23 into consideration and listen to what you have to
24 say.
25 MR. NIX: I'd like to hear from you on

1 the experience part of it. After all we're
2 looking for an equitable solution.
3 MR. SPARKS (EL PASO): Just for the
4 record, there's not a rule that goes by here that
5 every lawyer in here doesn't have some interest in
6 at any time.
7 MR. SPARKS (SAN ANGELO): I want to
8 hear what you've got to say. I recognize bias and
9 prejudice.
10 CHAIRMAN SOULES: Well, I was biased
11 and prejudiced on this about two and a half years
12 ago when it started. So that was before I had the
13 case. And that was coming out of another case,
14 actually. The realization that we discovered at
15 that time and I don't know exactly how many
16 million it is -- I think it's like 100 million,
17 but it may be a few hundred million dollars is all
18 the supersedeas money there is in the world.
19 That's all of it. So if it's a few hundred
20 million, we're now talking about seeing verdicts
21 at least that may exceed that.
22 For example, in the construction of nuclear
23 power plants, you run through a few hundred
24 million in a hurry, as everybody at this table
25 knows, because we're probably all serviced by

1 Texas utilities, or most of us, that are involved
2 in those kinds of construction plants right now.
3 And just the world is getting bigger and the
4 numbers are getting bigger. So, even if you could
5 make a supersedeas bond, there are going to be
6 cases that there's not enough supersedeas money in
7 the world to make.
8 But beyond that, in a smaller case, people
9 had a nice business; they got sued. The trial
10 went very close both ways on the evidence. Jury
11 finally came in with a small seven-figure number.
12 And those people could not make that bond and lost
13 their business, and the case was reversed.
14 Just like Judge Wood's $200,000, it didn't
15 make any difference. That was the kind of money
16 that a lot of people look at, a couple of million
17 dollars. And they lost their business and when
18 the case was turned around, there was no way to
19 recover their losses. They could not put Humpty
20 Dumpty back together again.
21 So, this rule really starts from a different
22 place than the litigation that's on file in New
23 York. It came through the Committee on
24 Administration of Justice. It was not in this
25 form at all when it started. And it took about a

1 year there. When it did come out of the Committee
2 on Administration of Justice, there was a very
3 heavy majority, very few dissents, concerning
4 whether or not this rule should be recommended.
5 And the debate had to do primarily with the
6 last paragraph, trying to get words that would
7 impose on the judge that was reviewing the
8 question of supersedeas, whether it be in the
9 trial court or whatever court it's pending in at
10 the time, whether it be in the trial court or the
11 appellate court, to preserve the plaintiff's
12 rights, the plaintiff who has the judgment to the
13 fullest extent possible by language and rule; and
14 we so we got into this.
15 It says, "An order granting, limiting or
16 modifying a stay must provide sufficient
17 conditions for the continuing security of the
18 adverse party to preserve the status quo and the
19 effectiveness of the judgment or order appealed
20 from."
21 Now, for example, a receiver could be
22 appointed for that corporation that was lost. Of
23 course, that corporation would have to pay the
24 bills. And there would have to be some showing
25 that the cash flow of the corporation could pay

1 the bills without reducing its assets in an
2 interim period.
3 An accounting firm or some organization would
4 make reports, frequently, monthly, perhaps, on
5 profits and losses and balance sheets. Those
6 reports to go to the secured party, the judgment
7 creditor and to the Court. At any time that's
8 reviewable under this rule, whether or not the
9 status quo is being preserved and the
10 effectiveness of the judgment is being preserved.
11 Pat Beard's point earlier about, do they have
12 to file schedules? That can be one of these
13 conditions required to be sufficient for the
14 continuing security and to preserve the status
15 quo.
16 MR. BEARD: Luke, aren't you just
17 talking about a Chapter 11. Why should our courts
18 run Chapter 11?
19 CHAIRMAN SOULES: We're not talking
20 about a Chapter 11 because --
21 MR. BEARD: You're asking the State
22 Court to run the equivalent of 11.
23 CHAIRMAN SOULES: No, I'm not, because
24 I'm not putting every one of that party's
25 creditors into a bankruptcy situation. I'm not

1 putting a party into the bankruptcy situation. I
2 don't have a situation now where the secured
3 creditors come in and want lists of stays to
4 foreclose on the company's real estate asset.
5 All I'm saying is, the company is going to
6 have to -- one of the things may be that this
7 judgment creditor gets a lien of record on all of
8 the assets of that company so that notice to
9 creditors is given.
10 Maybe there's something in lieu of that where
11 the lien does not go of record but the Court and
12 the judgment better monitor the business affairs
13 on a monthly basis or frequent basis. And if it
14 should ever become apparent that there is change,
15 those things would then go of record. And there
16 would be an injunction punishable by contempt
17 against the company and all of its officers that
18 they shall not borrow money without leave of the
19 Court and mortgage any of their assets.
20 MR. BEARD: But it's substantially
21 equivalent of 11 and 13.
22 CHAIRMAN SOULES: It's just not, Pat.
23 Because whenever you go into 11, you have to pull
24 in everybody into that proceeding that touches
25 that business and make them parties. You don't

1 have to do that under 364-A.
2 MR. BEARD: But still the Court is
3 going to have to consider the effect of -- if
4 somebody's out there foreclosing on you, you've
5 got a million dollar equity. You know, somebody
6 has got to consider what the effect of that is
7 going to be on this judgment creditor. I'm just
8 saying, I think it's practically 11 or 13 that
9 you're talking about.
10 CHAIRMAN SOULES: Well, I don't, but
11 it may be. This is a much narrower proceeding in
12 the sense that it goes to just one debt and
13 preserving the status quo for one debt. And it is
14 not the broad proceeding where every debt there is
15 now has to come in, assert its rights of record.
16 This proceeding could be relatively inexpensive
17 compared to an 11 proceeding.
18 MR. BEARD: Well, I think there's no
19 way that you can handle one debt. All creditors
20 are affected when you do that. And that's why my
21 comment to begin with is this Court would have to
22 have a great deal of guidance. They really would
23 have to have schedules.
24 CHAIRMAN SOULES: Well, maybe.
25 MR. BEARD: A list of questions.

1 CHAIRMAN SOULES: I'll finish and then
2 I'm not going to chair this part of it. Then
3 we've got the situation where there's a million
4 dollar judgment against the party that's got
5 $200,000. There's a hearing and the Court
6 concludes that's all there is.
7 The plaintiff is not going to get more than
8 $200,000. That's the status quo, and that's all
9 the security there is for his judgment. Once that
10 is covered then the Court could rule that that's
11 adequate under this rule.
12 Now if the judgment creditor finds that there
13 are other assets, then Court might rule that full
14 discovery, postjudgment discovery, proceeds so
15 that they can attempt to come back and show the
16 Court there really is more. And if they find some
17 more, do that too.
18 There could be part supersedeas. If the
19 party could show I can supersede to the extent of
20 $100,000, I can afford that. And I can lien the
21 $200,000 worth of assets that I have, but I can't
22 make more than $100,000 supersedeas; so there can
23 be part.
24 And then the final one, if the parties have
25 hidden assets in anticipation of judgment, the