

Agenda:

June 26-27,
1987

SPECIAL SUBCOMMITTEE ON TRAP RULES 47, 48 and 49

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June 10, 1987

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Bldg.
Austin, Texas 78701-2494

Dear Steve:

Thank you very much for agreeing by telephone to chair the Special Subcommittee of the Supreme Court Advisory Committee to review TRAP Rules 47, 48, and 49, for codification of the supersedeas law of Texas.

I appoint to your Committee: William V. Dorsaneo III (an attorney active in the appeal for Texaco), Harry M. Reasoner (an attorney active in the appeal for Texaco), Elaine Carlson, Pat Beard, and Tom Ragland.

The supersedeas issue is completely moot in the Pennzoil-Texaco litigation with the pendency of the Texaco bankruptcy. However, since the two sides have so deeply studied the problem when it was one of the forefront issues, I felt it important to have one member of each team in your assistance, with a majority not involved in that case or its former supersedeas issues.

The Texas Senate unanimously voted a resolution to study the supersedeas practice in Texas in the next biennium and to make a report at the next Legislative Session. SB 1414 (copy attached) got so far in this session as to pass the Senate Jurisprudence Committee although it did not have sufficient support to get to the Senate floor. Aside from the fact that this would be another instance of legislative invasion of the Supreme Court rule-making power, SB 1414 was riddled with defects and deficiencies readily apparent from reading it. The SCAC must act to produce a good work product in order to forestall something like this in the 1989 Legislative Session.

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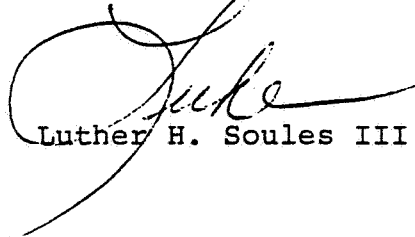
Mr. Steve McConnico
June 10, 1987
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Marie Yeates, an attorney with Vinson & Elkins, has done an in-depth memorandum on the Texas law (copy attached) and has also drafted a proposed rule (copy attached).

I am sending copies of this letter and the attached materials to each of your Subcommittee members by Federal Express today and ask that you make a written report on a timely basis so as to have the report in my hands no later than Thursday, June 18. That's right -- in less than a week. We will be preparing the meeting materials for distribution to the Committee as a whole on Friday, June 19, so that they can be mailed that day and be in the hands of the Committee members a few days prior to the June 26 meeting in event the members should choose to make some advanced preparation for the meeting.

I apologize for the short fuse on this matter, but somehow the timing just worked out that way. I am sure that your members will be willing to meet by telephone as often as necessary next week at convenient times.

Very truly yours,



Luther H. Soules III

LHSIII:gc
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Enclosures

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April 7, 1987

Luke Soules, Esq.
Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Re: Texas Supreme Court Advisory Committee

Dear Luke:

This letter is written in response to your letter dated February 23, 1987, requesting a review of Rule 47, Texas Rules of Appellate Procedure, in connection with the Supreme Court Advisory Committee's consideration of that rule. After reviewing the proposed amendment to Rule 47, which has been approved by the State Bar Committee on Administration of Justice, my observations are as follows:

1. Paragraph (k) Recognizes Existing Texas Law. The principal (indeed, the only) proposed amendment to Rule 47 is the addition to that rule of new paragraph (k) expressly authorizing the trial court to stay enforcement of a judgment and order security arrangements in lieu of a supersedeas bond. As you and I have discussed, Texas courts have previously recognized the trial court's authority to suspend enforcement of a judgment even though Rule 47, like its predecessor, Rule 364, Texas Rules of Civil Procedure, does not expressly authorize such action by the trial court. Thus, for example, in McCormick Operating v. Gibson Drilling, 717 S.W.2d 420, 427 (Tex. App.--Tyler 1986, no writ), the Court of Appeals stated:

A court may render a judgment that is final and appealable fixing the rights and liabilities of the parties, but defer its enforcement until final judgment is an ancillary or related proceeding. Rose v. Baker, 143 Tex. 202, 183 S.W.2d 438 (1944).

717 S.W.2d at 427. See, e.g., Hargrove v. Ins. Investment Corp., 142 Tex. 111, 176 S.W.2d 744 (1944) (one-half of money judgment ordered placed in registry of court pending appeal in related case); Jamison v. City of Pearland, 520

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S.W.2d 445 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ) (enforcement of city's judgment for taxes, etc., suspended pending appeal in related case). Other Texas decisions deal with suspension of judgment enforcement outside of the context of some related or companion case. In Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985 (Tex. Civ. App.--Dallas 1937, writ dism'd w.o.j.), the court entered a money judgment for commissions not yet accrued and stayed execution on the judgment until the date of accrual of the amounts due. The court's opinion includes the following language:

That the court had the right to stay execution and abate the interest on the amounts not due cannot be seriously questioned. "Under the general supervisory powers over their process, all courts of common law have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice." 23 C.J. p. 521. In the instant case, we think it was necessary for the accomplishment of the ends of justice, that the court establish the amounts and render judgment for the commissions not yet matured, and stay execution until their maturities, this to avoid a multiplicity of suits.

109 S.W.2d at 990. See Weaver v. Bogle, 325 S.W.2d 457 (Tex. Civ. App.--Waco 1959, no writ) (court entered money judgment on July 3, 1958, and by court's own motion ordered execution of the judgment stayed until November 24, 1958).

Similarly, in Harris v. Harris, 174 S.W.2d 996 (Tex. Civ. App.--Fort Worth 1943, no writ), a money judgment of \$65.00 was awarded against the father-in-law as part of a divorce and property settlement judgment. The judgment ordered the amount to be paid by the father-in-law in monthly installments. An argument was made that the judgment was not final because the total judgment amount of \$65.00 was not enforceable at once, payments being due under the judgment in monthly installments. Rejecting that argument, the appellate court stated: "under proper conditions, a court may enter a judgment and stay execution for a given time. . . ." 174 S.W.2d at 1000. The appellate court also noted that the trial court's action was "at least an adjustment of the equities between the parties. . . ." Id.

The parties may also agree to include in a judgment a stay of execution as in Karnes v. Barton, 272 S.W.2d 317

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(Tex. Civ. App.--Austin 1925, no writ), in which the parties agreed to, and the judgment therefore recited, a 100-day stay of execution.

Thus, Texas trial courts have previously stayed execution of judgments under a variety of circumstances. The Texas courts arguably are already empowered to exercise the flexibility as recognized in the cases cited above. See also Section 65.013, TEX. CIV. PRAC. & REM. CODE (injunction to stay execution of judgments). Arguably, the present Rule 47 may contemplate such trial court authority pursuant to the prefatory language in paragraph (a) "Unless otherwise provided by law or these rules. . . ." Indeed, Justice Powell's opinion in Pennzoil Co. v. Texaco, Inc., slip op. No. 85-1798 (U.S. Sup. Ct. April 6, 1987) (footnote 15), recognized this prefatory language as suggesting that the Texas trial court has authority to suspend the supersedeas bond requirement, if that court determines that such a requirement would violate the federal Constitution. Accordingly, express recognition of the trial court's authority as in proposed paragraph (k) would certainly be consistent with the prior Texas case authorities cited above.

As you know, the majority of the United States Supreme Court did not address the constitutionality of the Texas bond rules in the Pennzoil decision. However, Justice Stevens' concurring opinion, joined in by Justice Marshall, recognizes that, even if present Rule 47 were construed to provide no flexibility to the trial judge, it would not contravene the federal Constitution. Thus, Justice Stevens wrote:

I agree that it might be wise policy for Texas to grant an exception from the strict application of its rules when an appellant can satisfy these three factors. But the refusal to do so is certainly not arbitrary in the constitutional sense. A provision for such exceptions would require the State to establish rules and to hold individualized hearings whenever relevant allegations are made. Texas surely has a rational basis for adopting a consistent rule refusing to stay the execution of money judgments pending appeal, unless a sufficient bond or security is posted.

Justice Brennan likewise agreed that the Texas bond requirement is not unconstitutional. Nevertheless, the

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proposed amendment to Rule 47 may preclude any future constitutional challenge to the Texas bond rule.

2. Appellate Review of Security Requirements. Rule 49, Texas Rules of Appellate Procedure, presently provides for appellate review of supersedeas bonds in civil cases. Rule 49(b) states that the appellate court may review for excessiveness a bond "fixed by the trial court." The proposed rules change should perhaps include a companion amendment to Rule 49 expressly to allow for appellate review of trial court action under proposed paragraph (k) to Rule 47. Additionally, language might be inserted in proposed paragraph (k) in Rule 47 stating that, notwithstanding paragraphs (a) and (b) [money judgment bond approved by the clerk], the trial court may "fix" a supersedeas bond on a money judgment in less than the amount of that judgment. The trial court's authority to "fix" such a bond could then be reviewed by the appellate court for excessiveness under present Rule 49(b).

3. Continuing Jurisdiction of the Trial Court to Establish the Supersedeas Bond. A judgment can be executed upon only after the expiration of thirty days following the date on which the new trial motion is overruled, either expressly or by operation of law. Rule 627, TEX. R. CIV. P. That is also the date on which the trial court's plenary jurisdiction over the cause expires--thirty days after the date of overruling the motion for new trial. Rule 329b(e), TEX. R. CIV. P. See Transamerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799, 800 (Tex. 1978) ("[u]nder the express provision of [former Rule 329b], the trial court retains jurisdiction over the cause and, thus, plenary power over its judgment until thirty days after the original or amended motion for new trial is overruled." 567 S.W.2d at 800. See Burroughs v. Leslie, 620 S.W.2d 643, 644 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.) ("[u]nder rule 329b . . . the trial court retained jurisdiction over the cause and had plenary power over its judgment until thirty days after expiration of the time for overruling the motion for new trial. . . .").

In the usual case, the trial court should be requested to make the supersedeas bond determination before expiration of the period of its plenary jurisdiction. However, where no such determination is made during that time period, does the trial court have continuing jurisdiction to decide the supersedeas bond question? The trial court clearly has continuing jurisdiction to enforce its judgments, after expiration of its plenary power, so long as its actions do

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not modify the judgment or otherwise interfere with the jurisdiction of the Court of Appeals. See Arndt v. Farris, 633 S.W.2d 497 (Tex. 1982); Smith v. Smith, slip op. 01-85-0989-CV (Tex. App.--Houston [1st Dist.] Sept. 25, 1986, no writ); Crawford v. Kelly Field National Bank, slip op. No. 04-85-00529- CV (Tex. App.--San Antonio, Jan. 29, 1987).

As a corollary to the trial court's continuing jurisdiction over enforcement of its judgments, that court must also have continuing jurisdiction to deal with the supersedeas bond issues. As a matter of policy and practice, the Court of Appeals would probably prefer to have the trial court pass on the supersedeas question in the first instance. Furthermore, it is questionable whether the Court of Appeals can hear evidence as would be necessary in a determination of what security arrangements are required. Thus, that continuing jurisdiction should probably rest in the trial court.

There are few cases dealing with the issue of the trial court's continuing jurisdiction over the supersedeas bond issue. In Southwestern States General Corp. v. McKenzie, 658 S.W.2d 850, 852 (Tex. App.--Dallas 1983, writ ref'd n.r.e.), the appellant filed a motion within the period of the trial court's plenary jurisdiction asking to substitute negotiable instruments in lieu of any supersedeas bond pursuant to Rule 14(c), Texas Rules of Civil Procedure. The trial court entered its order with respect to that motion after the expiration of the trial court's plenary jurisdiction, i.e., over 30 days after the overruling of appellant's new trial motion.

On appeal, the appellee argued that the trial court lacked jurisdiction to rule on the supersedeas bond issue. The Court of Appeals disagreed. First the Court noted that the motion with respect to the supersedeas bond was filed in the trial court within the period of the trial court's jurisdiction, and thus, the trial court was required to rule upon it. However, the Court went on to say the following:

The fact that this court had acquired jurisdiction of the appeal did not diminish the trial court's continuing jurisdiction to fix the supersedeas bond. [Citations omitted.] Indeed, this court recently indicated that, at least in the Rule 14(c) case such as this, an applicant must properly first seek leave of the trial court. [Citation omitted.]

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658 S.W.2d at 852.

In Cashion v. Cashion, 239 S.W.2d 742 (Tex. Civ. App.--Waco 1951, no writ), the Court addressed the supersedeas bond issue with respect to a non-money judgment. Former Rule 364(e), Texas Rules of Civil Procedure, (now Rule 47(e), Texas Rules of Appellate Procedure) provided for the setting of the supersedeas bond in such cases by the trial court. In that case the appellant sought an injunction from the Court of Appeals to restrain execution of the judgment where no supersedeas bond had been filed. The Court stated as follows:

If appellants desire to suspend the judgment pending appeal they should proceed under Rule 364, sec., (e), Texas Rules of Civil Procedure, and not by way of injunction. The right to suspend a judgment by filing supersedeas bond in the trial court exists though appeal bond and transcript have already been filed in the court of appeals and such filing does not diminish the power and duty of the trial court to fix the amount of the supersedeas bond in cases of this character if and when requested to do so. The appellants concede that no request in this respect has ever been made of the court below.

A rules amendment providing for continuing jurisdiction of the trial court to deal with the supersedeas bond issue would be in order. It would also make sense to specify that Rule 621a, Texas Rules of Civil Procedure (post-judgment discovery), is available in connection with the supersedeas bond determination under proposed paragraph (k) of Rule 47. Clearly the trial court will require information concerning the judgment debtor's financial picture in order to exercise its discretion in making the security determination.

These are my observations concerning the practical workings of the proposed new Rule 47. Obviously, these comments draw heavily upon our experiences in the Pennzoil litigation and the collective wisdom of the attorneys in that litigation, especially W. James Kronzer.

Please let me know if I can be of further assistance.

Sincerely,

Marie R. Yeates

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MEMORANDUM

June 9, 1987

To: Judge Kronzer
Luke Soules

From: Marie R. Yeates

Re: Proposed Revisions to Supersedeas Rules -- Texas
Supreme Court Advisory Committee

Attached are the tentative proposed revisions of the Supersedeas Rule. They should be considered tentative only until reviewed by Judge Kronzer.

Proposed new Rule 47 would provide the trial court with discretion to determine the amount and type of security for any type of judgment, including a money judgment. It would also permit the trial court to make alternative security arrangements in lieu of posting security. Attached to the proposed Rule 47 are comments concerning the outlined changes.

Also attached, as requested by Luke, is a proposed re-write of Rule 49 providing for appellate review of the trial court's exercise of discretion. Comments are also attached to that proposed Rule.

Finally, as an alternative, we also attach a new paragraph (k) to be added to the present Rule 47 in order to attempt to engraft onto that rule, the authority provided federal courts by Rule 62b, Federal Civil Procedure, to stay the execution of a judgment. The Committee may be more likely to adopt a new paragraph (k), rather than attempting to rewrite the whole rule. However, Luke indicated that he was interested in an attempted rewrite of the whole rule.

In conjunction with your consideration of paragraph (k), you might note that the federal rules do not state the factors to be considered (e.g., irreparable harm, etc.) in the rule itself.

cc: Harry M. Reasoner

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PROPOSED RULE 47
TEXAS RULES OF APPELLATE PROCEDURE

Stay of Judgment Pending Appeal

(a) Suspension of Execution. Unless otherwise provided by law or these rules, the appellant may suspend execution of the judgment by posting security (such as a surety bond with good and sufficient sureties or a deposit under Rule 48 payable to the appellee) in an amount and type determined by the trial court, to secure payment of the judgment, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall pay all such damages and costs as said court may award against him. The amount and type of security necessary to suspend execution of judgment as provided in all succeeding paragraphs of this rule shall be established within the discretion of the trial court, considering what security is required to secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal, as well as the interests of justice and the relative equities of the parties. If the security posted is a surety bond or Rule 48 deposit and is sufficient to secure the costs and is filed or made within the time prescribed by Rule 40, it constitutes sufficient compliance with Rule 46.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount and type of security shall be determined by the trial court. The clerk may approve a good and sufficient surety bond or deposit pursuant to Rule 48 without the exercise of the discretion of the trial court if the appellant files a bond or deposit in at least the amount of the judgment, interest, and costs.

(c) Land or Property. When the judgment is for the recovery of land or other property, the posting of security

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shall be further conditioned that the appellant shall, in case the judgment is affirmed, pay to the appellee the value of the rent or hire of such property during the appeal, and the security shall be in the amount and type determined by the trial court.

(d) Foreclosure on Real Estate. When the judgment is for the recovery of or foreclosure upon real estate, the appellant may suspend the judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by posting security in the amount and type to be determined by the trial court, not less than the rents and hire of said real estate; but if the amount of the security is less than the amount of the money judgment, with interest and costs, then the trial court may within its discretion suspend execution on the money judgment with or without the posting of additional security.

(e) Foreclosure on Personal Property. When the judgment is for the recovery of or foreclosure upon specific personal property, the appellant may suspend the judgment insofar as it decrees the recovery of or foreclosure against said specific personal property by posting security in an amount and type to be determined by the trial court, not less than the value of said property on the date of rendition of judgment; but if the amount of the security is less than the amount of the money judgment with interest and costs, then the trial court within its discretion may suspend execution on the money judgment with or without the posting of additional security.

(f) Other Judgment. When the judgment is for other than money or property or foreclosure, the security shall be in such amount and type to be determined by the trial court as will secure the plaintiff in judgment in any loss or damage occasioned by the delay on appeal considering the interests of justice and the relative equities of the

parties, but the trial court may decline to permit the judgment to be suspended on filing by the plaintiff of security to be determined by the trial court in such an amount as will secure the defendant in judgment in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper, considering the interests of justice and the relative equities of the parties.

(g) Child Custody. When the judgment is one involving the care or custody of a child, the appeal, with or without security, shall not have the effect of suspending the judgment as to the care or custody of the child unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) For State or Subdivision. When the judgment is in favor of the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the judgment holder has no pecuniary interest in it and no monetary damages can be shown, the security shall be allowed and its amount and type determined within the discretion of the trial court, and the liability of the appellant shall be for the amount of the security if the appeal is not prosecuted with effect. Under equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the security may allow recovery for less than its full amount.

(i) Stay of Judgment upon Alternative Security Arrangements. The trial court may, in the exercise of its discretion, stay the judgment pending appeal by alternative security arrangements in lieu of posting security. Such alternative security arrangements should be sufficient to secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal and to preserve the

effectiveness of the judgment or order being appealed, but the trial court may consider the interests of justice and the relative equities of the parties in determining the adequacy of the alternative security arrangement. The trial court may vacate, limit or modify this stay for good cause during the pendency of the appeal.

(j) Effect of Stay of Judgment. The filing and approval by the clerk or the posting of security in the amount and type determined by the trial court or the provision for alternative security arrangements in compliance with this Rule,

(1) shall suspend execution on the judgment, or so much thereof as has been suspended by the trial court, and if execution has issued, the clerk shall forthwith issue a writ of supersedeas; and

(2) shall suspend any judgment liens established or that could otherwise be established pursuant to Texas Property Code Sec. 52.010, et seq.

Where the judgment is suspended only in part, and judgment liens attach with respect to those portions of a judgment not suspended, or, where suspension of the judgment has been denied, the trial court shall have discretion to direct that specified property of appellant, but not other property, shall be subject to judgment liens.

(k) Certificate of Deposit. If the appellant makes a deposit in lieu of a bond, posts other security, or makes alternative security arrangements, the clerk's certificate that the deposit has been made, the security posted or the alternative security arrangement made as required by the trial court shall be sufficient evidence thereof.

(l) Continuing Trial Court Jurisdiction. The trial court shall have continuing jurisdiction during the pendency of an appeal from a judgment, even after the expiration of its plenary power, to determine the amount and the type of security and, upon any changed circumstances, to modify the

amount or the type of security required to continue the suspension of judgment. If the security is determined or altered by the trial court after the attachment of jurisdiction of the court of appeals, the appellant shall notify the court of appeals of the security determination by the trial court. The trial court's exercise of discretion under this rule is subject to review under Rule 49, Texas Rules of Appellate Procedure.

COMMENTS TO PROPOSED RULE 47
TEXAS RULES OF APPELLATE PROCEDURE

Comments on Paragraph (a).

Comment 1: As used in this Rule, "trial court" means the court in which the judgment was rendered. This is consistent with TEX. CIV. PRAC. & REM. CODE § 65.023 providing for mandatory venue for any separate action to stay a suit for execution on a judgment in the court in which the suit is pending or the judgment was rendered.

Comment 2: The prefatory language of the prior rule, "unless otherwise provided by law or these rules . . ." remains in the proposed new rule and is intended to reflect that the trial court has other authority to suspend enforcement of a judgment, see TEX. CIV. PRAC. & REM. CODE § 65.013, and that the trial court has the authority to suspend execution of a judgment without posting security upon alternative security arrangements pursuant to paragraph (i) of this proposed Rule.

Comment 3: The term "security," as used in the proposed rule, is intended to include a surety bond, deposit under Rule 48, TEX. R. APP. P., or any form of property which the trial court may determine to be good and sufficient security under this Rule.

Comment 4: This paragraph (a) of the proposed rule continues the prior law that the appellant generally may supersede the judgment as a matter of right; the right to obtain suspension of execution on a judgment pending appeal is, as a general rule, not dependent upon the discretion of the trial court. Schrader v. Garcia, 512 S.W.2d 830 (Tex. Civ. App.--Corpus Christi 1974, no writ) ("Defendant [has] the right to suspend the execution of [money] judgment by giving a good and sufficient bond. . . ."); Brown v. Faulk, 231 S.W.2d 743 (Tex. Civ. App.--San Antonio 1950, mand.

overr.) (defendant had the right to supersede the judgment on a note to foreclose a chattel mortgage); R.B. Spencer & Co. v. Texas Pacific Coal & Oil Co., 84 S.W.2d 853 (Tex. Civ. App.--Ft. Worth 1935), writ dismiss'd, 91 S.W.2d 411 (Tex. Civ. App.--Ft. Worth 1936, writ dismiss'd) (appellant entitled to supersedeas in a foreclosure on real estate judgment).

The appellant is not, however, entitled to suspend enforcement of certain types of judgments as a matter of right, as set out in paragraph (f) and (g) of this Rule. This is merely a continuation of the prior law. Pena v. Zardenetta, 714 S.W.2d 72 (Tex. App.--San Antonio 1986, no writ) (relators were entitled to supersedeas only if the trial court judgment was for money, property, or foreclosure).

Comment 5: Proposed paragraph (a) contains a substantive change in the current law by providing the trial judge with discretion to determine the amount and type of security necessary to suspend execution and enforcement of all types of judgment. By vesting the trial court such discretion in setting the type of security required to suspend execution, this paragraph recognizes that a form of security approved by the court can provide protection to the appellee pending appeal equivalent to that afforded by a supersedeas bond or a Rule 48 deposit. In those situations where the appellant is able to post a form of security that would provide protection to the appellee equivalent to that provided by a supersedeas bond or Rule 48 deposit, the trial court, in its discretion, should be free to suspend execution or enforcement of the judgment upon appellant's posting of such security.

Comment 6: As stated in the proposed paragraph (a), the amount and type of security should be such as will secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal. However, the proposed

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rule would change the prior rule by allowing the trial court also to consider the interests of justice and the relative equities of the parties in determining the amount and type of security required. The considerations applied by the federal courts under Rule 62, Fed. R. Civ. P., and Rule 8(a), Fed. R. App. P., may provide assistance in articulating how the trial court might weigh the interests of justice and the relative equities of the parties. To determine whether to suspend a judgment upon less than full security, the federal courts consider factors such as:

(1) whether the [appellant] has made a showing of likelihood of success on the merits;

(2) whether the [appellant] has made a showing of irreparable harm if the [judgment] is not [suspended];

(3) whether the granting of the [suspension of the judgment] would substantially harm the [appellee]; and

(4) whether the granting of the [suspension of the judgment] would serve the public interest.

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981).

See United States v. Baylor University Medical Center, 711 F.2d 38 (5th Cir. 1983); O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982); United States v. State of Texas, 523 F. Supp. 703 (E.D. Tex. 1981). See, e.g., Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189 (5th Cir. 1979) (requiring appellant to demonstrate objectively that "full" bond should not be required because of the appellant's present financial ability to respond to a money judgment and appellant's financially secure plan for maintaining that same degree of solvency during the period of an appeal and because posting full bond would impose undue financial burden on the appellant). The standard of proof for "likelihood of success on the merits" must be less than what is required to grant a motion for judgment n.o.v. or motion for a new trial, but more than mere proof of a non-frivolous appeal. Where the balance of

the remaining factors weighs heavily in favor of the appellant, the federal courts have reduced the standard of proof by requiring only proof of a substantial case on the merits of the appeal. See Ruiz, 650 F.2d at 565.

Comments on paragraph (b):

Comment 1: This paragraph provides that the amount and type of security required to be posted by the appellant in order to suspend execution of a judgment shall be set at the discretion of the trial court. Under current Texas law, in the case of a money judgment, the supersedeas bond must be at least equal to the amount of the judgment, interest, and costs. Mudd v. Mudd, 665 S.W.2d 128 (Tex. App.--San Antonio 1983, mand. overr.); Fortune v. McElhenney, 645 S.W.2d 934 (Tex. App.--Austin 1983, no writ); Kennesaw Life & Accident Ins. Co. v. Streetman, 644 S.W.2d 915 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Haney Electric Co. v. Hurst, 608 S.W.2d 355 (Tex. Civ. App.--Dallas 1980, no writ); Cooper v. Bowser, 583 S.W.2d 805 (Tex. Civ. App.--San Antonio 1979, no writ); Schrader v. Garcia, 512 S.W.2d 830 (Tex. Civ. App.--Corpus Christi 1974, no writ).

Proposed paragraph (b) constitutes a change in current law by providing that the appellant need not post security in the full amount of the judgment, if the trial court finds, in its discretion, that a lesser amount is sufficient. The trial court is afforded discretion as to both the type and amount of security to be posted. The trial court should apply the general standard, stated in paragraph (a), considering both the need to protect the judgment creditor against damages due to delay on appeal and the interests of justice and the relative equities of the parties.

Comment 2: This Rule does not intend to change current law regarding an appellant's automatic right to suspension

of the judgment by posting a supersedeas bond or Rule 48 deposit in the full amount of the judgment, interest, and costs. As under the prior law, such a bond or deposit, in at least the amount of the judgment, interests and costs, may be approved by the clerk without the exercise of discretion by the trial court.

Comments on paragraphs (d) and (e):

Comment 1: The proposed change to paragraph (d) would vest the trial court with discretion to suspend execution on the money judgment with or without the posting of additional security where the amount of security to suspend the foreclosure is less than the amount of the money judgment, with interest and costs. Under the prior rule, the full amount of the money judgment was required to be posted, to suspend execution on the money judgment. However, under the proposed rule, the trial court has discretion in setting the amount of security necessary to suspend the judgment. If the security set by the trial court is less than the full amount of the money judgment, execution on the money judgment may be suspended.

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Comments on paragraph (f):

Changes to this proposed paragraph (f) reflect the notion embodied in the new proposed rule that the type and amount of security should be determined by the trial court based on both the intention to secure the plaintiff in judgment against any loss or damage occasioned by delay on appeal, as well as the interests of justice and the relative equities of the parties.

Comments on paragraph (h):

Comment 1: The second to last sentence in paragraph (h) of the prior Rule 47 states that "the discretion of the

trial court in fixing the amount shall be subject to review." That sentence has been deleted in light of the new Rule 49 subjecting all trial court determinations under Rule 47 to review by the appellate court. Additionally, the liability of the appellant for the "face" amount has been changed in the new paragraph (h) to provide for liability of the appellant for the amount of the security. This change reflects that the type of security approved by the trial court is not limited to a Rule 48 deposit or supersedeas bond.

Comments on paragraph (i):

Comment 1: This paragraph authorizes the trial court to stay enforcement of a judgment upon alternative security arrangements in lieu of posting security. For example, the trial court might order a standstill arrangement pursuant to which assets of the judgment creditor would not be transferred or encumbered outside of the ordinary course of business. pro quo for suspension of the judgment pending appeal.

Texas courts have previously recognized the trial court's authority to suspend enforcement of a judgment.

That the court had the right to stay execution and abate the interest on the amounts not due cannot be seriously questioned. "Under the general supervisory powers over their process, all courts of common law have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice." 23 C.J. p. 521. In the instant case, we think it was necessary for the accomplishment of the ends of justice, that the court establish the amounts and render judgment for the commissions not yet matured, and stay execution until their maturities, this to avoid a multiplicity of suits.

Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985, 990 (Tex. Civ. App.--Dallas 1937, writ dismissed w.o.j.). Recognition of such trial court authority is consistent with prior case law. See, e.g., McCormick Operating v. Gibson Drilling, 717 S.W.2d 425, 427 (Tex. App.--Tyler 1986, no writ) (a court

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may render a judgment that is final and appealable fixing the rights and liabilities of the parties, but defer its enforcement until final judgment in an ancillary or related proceeding); Hargrove v. Insurance Investment Corp., 142 Tex. 111, 176 S.W.2d 744 (1944) (one-half of money judgment ordered placed in registry of court pending appeal in related case); Jamison v. City of Pearland, 520 S.W.2d 445 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ) (enforcement of city's judgment for taxes, etc., suspended pending appeal in related case); Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985 (Tex. Civ. App.--Dallas 1973, writ dismissed w.o.j.) (court entered money judgment for commissions not yet accrued and stayed execution on the judgment until the date of accrual of the amounts due); Weaver v. Bogle, 325 S.W.2d 457 (Tex. Civ. App.--Waco 1959, no writ) (court entered money judgment on July 3, 1958, and by court's own action ordered execution of the judgment stayed until November 24, 1958).

Comments on paragraph (j):

Comment 1: Once the appellant posts the required security or provides for the alternative security arrangement determined by the trial court, the proposed paragraph (j) provides that the effect is to suspend the judgment by precluding any enforcement of the judgment.

Comment 2: This proposed paragraph changes current law by providing that the posting of security or making alternative security arrangements as provided by this rule will also suspend the effectiveness of judgment liens.

Comment 3: The proposed paragraph (j) also changes the law by permitting the trial court to designate that only specific property of the appellant may be subjected to judgment liens within the discretion of the trial court.

Comments on paragraph (k):

Comment 1: Paragraph (k) merely facilitates the procedural mechanics involved in those situations where a trial court approves other security arrangements in lieu of a supersedeas bond or Rule 48 deposit. The clerk's certificate that the security arrangements ordered by the trial court have been made is sufficient evidence thereof.

Comments on paragraph (l):

Comment 1: Paragraph (l) recognizes continuing jurisdiction in the trial court to make the determinations contemplated by the prior paragraphs of the proposed rule. The judgment becomes final for purposes of execution at the same date that the plenary jurisdiction of the trial court expires. See TEX. R. CIV. P. 627 and 329b(d) and (e). Thus, the language of the present Rule 47(j) may be read to imply that the security may be posted upon trial court approval even after execution has issued, i.e., after expiration of the trial court's plenary power. See Southwestern States General Corp. v. McKenzie, 658 S.W.2d 850 (Tex. App.--Dallas 1983, writ dismissed) (recognizing the trial court's continuing jurisdiction to fix the supersedeas bond after expiration of the trial court's plenary jurisdiction, at least where the motion upon which the trial court ruled was filed within the period of the trial court's plenary jurisdiction).

In the usual case, the appellant should request the trial court to make the security determination before expiration of the period of that court's plenary jurisdiction. However, where no such determination is made during that time period, or where a determination was made but the circumstances under which it was made have changed and good cause exists to modify the security, the trial court should have continuing jurisdiction to determine or modify the

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amount or type of security required to suspend or to continue the suspension of judgment.

As a matter of policy and practice, the trial court should pass upon the security questions in the first instance subject to review by the court of appeals under Rule 49, TEX. R. APP. P. The court of appeals may lack jurisdiction to take evidence that may be necessary in a determination of what security arrangements are required. See McGee v. Ponthieu, 634 S.W.2d 780 (Tex. App.--Amarillo 1982, no writ). Paragraph (1) therefore recognizes that the trial court exercises continuing jurisdiction to permit the parties to conduct necessary discovery in order to muster the evidence before the trial court and to permit that court to make the initial security determination, as well as reconsidering its prior security determination upon any "changed circumstances."

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PROPOSED RULE 49
TEXAS RULES OF APPELLATE PROCEDURE

Appellate Review of Security in Civil Cases

(a) Appellate Review of Stay of Judgment Pending Appeal. The exercise of discretion by the trial court pursuant to Rule 47 or the approval of a bond or deposit by the clerk as provided in Rule 47(b), is subject to review by the appellate court in which the appeal is pending, or prior to the time that the appellate court jurisdiction attaches, by a writ of mandamus in the court of appeals.

The court of appeals reviewing the trial court's exercise of discretion may require a change in the amount or type of security determined by the trial court either because the security is excessive or insufficient. The court of appeals may also remand to the trial court for findings of fact or the taking of evidence.

(b) Alterations in Security. If upon its review, the appellate court requires additional security for suspension of the judgment, execution of the judgment shall be suspended for twenty days after the order of the court of appeals is served. If the appellant fails to comply with the order within that period, the clerk shall notify the trial court that execution may be issued on the judgment, but the appeal shall not be dismissed unless the clerk finds that the bond or deposit is insufficient to secure the costs. The additional security shall not release the security previously posted or alternative security arrangements made.

If the clerk finds that the original supersedeas bond or deposit is insufficient to secure the costs, he shall notify appellant of such insufficiency. If appellant fails, within twenty days after such notice, to file a new bond or make a new deposit in the trial court sufficient to secure payment of the costs and to file a certified copy of the bond or certificate of deposit in the appellate court, the appeal or writ of error shall be dismissed. The additional

security shall not release the liability of the surety on
the original supersedeas bond.

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COMMENTS TO PROPOSED RULE 49
TEXAS RULES OF APPELLATE PROCEDURE

Paragraph (a). Comment 1: Proposed Rule 49 provides the appellate court with the power to review the trial court's exercise of discretion regarding the amount and type of security necessary to suspend execution of judgments. This proposed rule makes clear that appellate review for insufficiency or excessiveness of security extends to all types of judgments.

Comment 2: This paragraph recognizes that the appellate court may review the trial court's exercise of discretion before the appellate court's jurisdiction attaches by seeking writ of mandamus.

Comment 3: The court of appeals reviews the trial court's determination as to amount and type of security for insufficiency or excessiveness.

Comment 4: The review by the appellate court is limited to whether the trial court abused its discretion at the time the trial court set the security. In situations where changed circumstances may justify a modification of the security arrangement, the party seeking modification should first apply to the trial court for such modification pursuant to Rule 47.

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COMMENTS TO PROPOSED NEW PARAGRAPH (k)
TO BE ADDED TO RULE 47

Paragraph (k): Comment 1: This paragraph is a proposed addition to the present Rule 47 that seeks to provide the trial court with authority to suspend execution of all or part of a judgment in the exercise of that court's discretion. This proposed additional paragraph seeks to give the Texas trial court discretion like that exercised by the federal courts under Rule 62, Fed. R. Civ. P., and Rule 8(a), Fed. R. App. P.

Comment 2: This proposed paragraph goes only to "enforcement" of the judgment by execution; it does not purport to affect judgment liens as established by the Texas Property Code.

Comment 3: This proposal differs from the earlier proposed new paragraph (k) previously rejected by the Advisory Committee in that the trial court would determine whether to stay the judgment (and would have continuing jurisdiction to do so pending appeal) subject to review by the court of appeals. Trial court determination and fact finding is more appropriate than fact finding in the appellate court. The new proposed paragraph (k) expressly provides for review in the court of appeals. Review of any decision by the court of appeals could be had pursuant to a mandamus proceeding in the Supreme Court.

Paragraph (k). Comment 4: Proposed additional paragraph (k) is substantially different from the proposed paragraph (k) previously rejected by the Supreme Court Advisory Committee with respect to what findings will support a stay of the judgment. Under the earlier proposal, the findings necessary to support a stay of enforcement required that the appeal not be frivolous or taken for purposes of delay. However, in many, if not the majority of cases, that standard is easily satisfied. The new proposed

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paragraph (k) would require a stronger standard of proof of a substantial case on the merits of the appeal. If the factors are to be stated in the rule itself as mandatory criteria, then the lesser standard of "substantial" care on the merits may be preferable to the federal rule criterion of "likelihood of success" on the merits, of the appeal. Even the federal cases recognize that the lesser "substantial case" standard might be applied when the other criteria weigh heavily in favor of the stay of the judgment. Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981). Thus, the possible standards in increasing degree of difficulty for the appellant would be (1) the appeal is not frivolous, (2) the appellant has a substantial case on appeal or (3) the appellant has a likelihood of success on appeal.

The previously rejected paragraph (k) also did not require the appellant to make a showing that he would suffer irreparable harm if a stay were not granted or the judgment not suspended. The underlying theory of Rule 47 is the need to protect the judgment creditor who has obtained a judgment. That purpose may not be adequately served unless the appellant is required to show that he would sustain irreparable harm absent a stay.

In the proposed new paragraph (k), the other findings stated to be necessary before judgment may be suspended are those applied by the federal courts pursuant to Rule 62, Fed. R. Civ. P., and Rule 8, Fed. R. App. P. The federal courts require that the appellant make a showing that he will suffer irreparable harm if the judgment is not suspended and that the granting of the suspension of the judgment will not substantially harm the appellee. See Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); U.S. v. Baylor University Medical Center, 711 F.2d 38 (5th Cir. 1983); O'Bryan v. Estelle, 691 F.2d 703 (5th Cir. 1983); U.S. v. State of Texas, 523 F. Supp. 703 (E.D. Tex. 1981);

Poplar Grove Planting and Refining Co. v. Bache Halsey
Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979).

PROPOSED NEW PARAGRAPH (k)
TO BE ADDED TO RULE 47

Paragraph (k). In lieu of a supersedeas bond, a Rule 48 deposit, or any portion of either thereof, the trial court may order a stay of all or any portion of any proceedings to enforce the judgment or order appealed from pending an appeal, upon a showing by the appellant and finding by the trial court that the appellant has a substantial case on the merits of the appeal; irreparable harm will be sustained by the appellant if the judgment is not suspended; granting the suspension would not substantially harm the appellee; and granting the suspension would serve the interests of justice.

The trial court's order granting any stay of enforcement shall provide for posting security or alternative security arrangements taking into account what security is required to secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal, as well as the interests of justice and the relative equities of the parties.

The trial court will have continuing jurisdiction to vacate, limit, or modify the stay for good cause or changed conditions during the pendency of the appeal. A motion to vacate, limit, or modify the stay shall be filed and determined in the trial court. The exercise of discretion by the trial court is subject to review by the appellate court in which the appeal is pending, or prior to the time that the appellate court jurisdiction attaches, by a writ of mandamus in the court of appeals.

COC00031

TEXAS LEGISLATIVE SERVICE

4/9/87

Filed by Parker of Orange

SB 1414

9 -20--290

A BILL TO BE ENTITLED

AN ACT

1
2 relating to a unified system of security for judgments pending
3 appeal, to provide a procedure to supersede judgment liens, to
4 provide a limit on the amount of security required, to provide
5 flexibility in the type and amount of security required, to
6 provide for interlocutory appellate review, to provide for
7 implementing rules, and to declare an emergency.

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

9 SECTION 1. This Act may be cited as the Security for
10 Judgment Act.

11 SECTION 2. The Legislature of the State of Texas finds
12 that:

13 (1) Texas' statutes and rules currently provide no
14 method by which judgment liens may be superseded pending
15 exhaustion of all appeals;

16 (2) Art. I., Sec. 13 of the Texas Constitution
17 provides a right of access to the appellate courts to present a
18 meaningful appeal by due course of law; and

19 (3) The current security for judgment procedure may
20 not afford judicial discretion as to the amount and type of
21 security available to supersede a money judgment; and

22 (4) The constitutionality of the Texas security for
23 judgment procedure provided for in Tex. R. App. P. 47, 48 & 49
24 and Section 52.009, Property Code et. seq. has been questioned as

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1 a denial of the due process and equal protection guarantees of
2 the Fourteenth Amendment to the United States Constitution; and

3 (5) The world-wide surety bonding capacity is only
4 approximately \$1.2 billion; and

5 (6) The current security for judgment procedures are
6 in conflict, are ambiguous and are not under the administration
7 of a single branch of government; and

8 (7) The provisions of this Act will accomplish much-
9 needed clarification and afford equity, while preserving the
10 right of persons to obtain appropriate relief through the
11 appellate processes in the court system; and

12 (8) The 70th Legislature, having determined that there
13 needs to be a substantive right of litigants to give security for
14 judgment pending appeal in order to protect the rights of access
15 by judgment debtors to the appellate courts of the State of Texas
16 and the United States Supreme Court to present a meaningful
17 appeal by due course of law enacts this legislation to accomplish
18 this purpose.

19 SECTION 3. Section 52.001, Property Code is amended to
20 read as follows:

21 Sec. 52.001 Establishment of Lien

22 A first or subsequent abstract of judgment, when it is
23 recorded and indexed in accordance with this chapter, constitutes
24 a lien on the real property of the defendant located in the
25 county in which the abstract is recorded and indexed, including
26 real property acquired after such recording and indexing;
27 provided, however that no abstract of the judgment shall issue 000003

