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## Superseding Money Judgments in Texas: Four Proposed Reforms to Help the Business Litigant and to Further Improve the Texas Civil Justice System

James Holmes  
*Holmes PLLC*

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## ARTICLE

# SUPERSEDING MONEY JUDGMENTS IN TEXAS: FOUR PROPOSED REFORMS TO HELP THE BUSINESS LITIGANT AND TO FURTHER IMPROVE THE TEXAS CIVIL JUSTICE SYSTEM

JAMES HOLMES\*

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\* The author practices commercial litigation at Holmes PLLC in Dallas, Texas. The author cares for Texas's business environment and civil justice system. He was raised and educated in Texas, and has lived his entire life in the State. He received a Bachelor of Science from Trinity University in 1992, where he studied accounting and philosophy, and a Juris Doctorate from the University of Texas School of Law in 1995, where he worked as an editor on the Texas Law Review. From 1995 to 1996, he worked as a briefing attorney on the Texas Supreme Court.

Although the ideas, perspectives, and proposals in this paper are entirely his own, the author thanks and acknowledges—for their reviews of this paper—Scott A. Barnes, an accomplished accounting professional working in Dallas, and Professor Elaine Carlson of South Texas College of Law, the foremost authority on Texas supersedeas laws. Also, the author acknowledges those Texas business litigants who have suffered from the inefficiencies, emotional turmoil, and injustices engendered by the present supersedeas laws and whose experiences have inspired the author's efforts.

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On the four-month trial in *Pennzoil Co. v. Texaco Inc.*,<sup>1</sup> in the 151st District Court of Harris County, Texas during the summer and fall of 1985—which resulted in a \$10.53 billion judgment for plaintiff Pennzoil Company and a corresponding \$10.53 billion liability for defendant Texaco Inc.:

Setting aside its relationship to reality, Pennzoil's tale was a powerful and compelling one, mythological in scope and appeal. Its details were vivid and neatly in place, reinforced by the oft-repeated themes of betrayal and honor drawn by [Pennzoil's trial lawyer] from his first moment before the jury.<sup>2</sup>

On Texas supersedeas laws immediately following the *Pennzoil Co. v. Texaco Inc.* judgment:

An appellant who can not practicably post a supersedeas bond, but who could post other ad[e]quate security, perhaps non-liquid assets of a greater value than the bond would secure, may nonetheless have their property confiscated by execution pending appeal, an eventuality which might effectively preclude appellate access from the perspective of the appellant. Such an appellant may be forced into bankruptcy or liquidation as a price for obtaining judicial review; a meaningful appeal is thus denied.<sup>3</sup>

## I. INTRODUCTION

The Texas civil justice system and business owners—particularly, owners of businesses that cannot readily remove \$25 million from operations for several years—badly need further reforms to laws on superseding judgments awarding money.<sup>4</sup> This need arises from the continuing dynamic of the now-infamous *Pennzoil Co. v. Texaco Inc.* case of the late 1980s. Trial court proceedings may produce onerous money judgments that do not comport with business-world realities or that otherwise contain reversible error; consequently, the judgments demand appellate review. However, such

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1. *Pennzoil Co. v. Texaco Inc.*, No. 84-05905, 1985 WL 1276957 (151st Dist. Ct., Harris County, Tex. Dec. 10, 1985).

2. STEVE COLL, *THE TAKING OF GETTY OIL* 416 (1987).

3. Elaine A. Carlson, *Mandatory Supersedeas Bond Requirements—A Denial of Due Process Rights?*, 39 *BAYLOR L. REV.* 29, 60 (1987).

4. This paper addresses judgments “for recovery of money.” TEX. R. APP. P. 24.2(a)(1). It does not address or propose statutory amendments or procedural rule amendments for judgments for recovery of real or personal property, conservatorship or custody of minors or the disabled, judgments in favor of a governmental entity, or other judgments. *Id.* R. 24.2(a)(2)–(5). Judgments awarding money, more so than other types of civil judgments, frequently beset smaller Texas businesses and businesspeople, driving many to bankruptcy or other extreme financial measures.

review usually depends on the losers' (the judgment debtors') ability to supersede the onerous judgments. If they cannot supersede such judgments, they lose meaningful appellate access—or gain it at too great a cost.

By way of background, as part of 2003's wide-sweeping civil justice reforms, Texas law began aiding judgment debtors (i.e., litigants liable under a civil judgment) while still protecting the rights to judgment security during an appeal for judgment creditors (i.e., litigants entitled to relief under a civil judgment). Section 52.006 of the Civil Practice and Remedies Code (the "statute") and Rule of Appellate Procedure 24 (the "procedural rule") allow for judgment-suspension security, such as agreements between litigants, supersedeas bonds, cash deposits, or other security.<sup>5</sup> The statute and procedural rule cap a judgment debtor's burden; the debtor must provide security at the least of (i) the judgment amount (specifically, compensatory damages, post-judgment interest, and court costs), (ii) \$25 million, or (iii) one-half of the debtor's net worth.<sup>6</sup> Further, both the statute and procedural rule forbid forms of security that cause "substantial economic harm" to a judgment debtor or that interfere with its use of assets "in the normal course of business."<sup>7</sup> The 2003 reforms to the statute, and the revisions to the procedural rule that followed, are commendable—they have protected the interests of businesses and businesspeople in the Texas civil justice system for over sixteen years.

Since House Bill 4's passage in 2003, the statute and procedural rule, as well as the case law construing them, openly promote the policy of allowing a judgment debtor to provide security in a flexible, reasonable manner—to avoid financial hardship to the debtor and to assure its rights to an appeal.<sup>8</sup>

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5. See TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a) (addressing the amount of security for money judgments); TEX. R. APP. P. 24 (discussing the "suspension of enforcement of judgment pending appeal in civil cases").

6. CIV. PRAC. & REM. § 52.006(b).

7. *Id.* § 52.006(c); TEX. R. APP. P. 24.

8. See generally Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments on Appeal After House Bill 4*, 46 S. TEX. L. REV. 1035, 1038 (2005) ("[In 2003] [t]he legislature made sweeping changes to Chapter 52 [of the Civil Practice and Remedies Code], making the posting of alternate security to suspend judgment enforcement on appeal substantially easier for the judgment loser, reflecting a new balance between the judgment creditor's right in the judgment and the dissipation of the judgment debtor's assets during the appeal against the judgment debtor's right to meaningful and easier access to appellate review."). "Amendments promulgated in 2003 to Appellate Rule 24 further ease the burden of obtaining an order of lesser security to suspend judgment enforcement. Legislative provisions were enacted to offer a judgment debtor additional flexibility to post security to suspend execution." See *id.* at 1069 (citing CIV. PRAC. & REM. § 52.006).

Directly addressing 2003's promulgation of Section 52.006, the Texas Supreme Court observed these "changes in supersedeas may be seen as more protective of debtors, consistent with deep, populist Texas traditions. They may also be seen as respecting the importance of the right to a meaningful appeal. Either way, first the Court, and then the Legislature, have deliberately made supersedeas more easily available."<sup>9</sup>

Despite the improvements to Texas supersedeas practice since 2003, many serious problems remain—particularly for small-to-medium sized businesses, or businesspeople, which need to pursue an appeal but are unable to deposit the requisite cash or obtain a supersedeas bond. Business litigants routinely face large Texas judgments that well exceed \$25 million or one-half of their net worth. Understandably, they seek to appeal such judgments, which often contain numerous reversible errors or, at a minimum, require some appellate oversight. The problem appears most severely for so-called "land rich, cash poor" business litigants—those having substantial real estate holdings such as land, farms, buildings, and oil and gas interests, but having relatively less cash or cash equivalents. Many smaller Texas businesses and businesspeople are land rich, but are also cash poor. Consequently, they run a substantial risk of encountering the worst problems under Texas's existing supersedeas laws in the event they become losing defendants in civil litigation.

As a general rule, Texans do not give up fighting once they perceive that they have suffered an injustice. They fight hard; when necessary, they fight to the bitter end. Accordingly, business litigants in the Texas civil justice system that face sizeable judgments will pursue appeals—in search of full or partial relief—despite their inability to readily supersede a money judgment. The lengthy experience of the author and Texas case law are replete with examples of Texas business litigants fighting a judgment on appeal, while simultaneously fighting to preserve their hard-earned assets from judgment-collection efforts by judgment creditors.

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9. *In re Longview Energy Co.*, 464 S.W.3d 353, 359 n.27 (Tex. 2015) (orig. proceeding) ("These changes to appellate security reform are intended to facilitate appellate access and provide relief to judgment debtors facing insolvency as the only option to avoid judgment execution or to those with a judgment so large that the cost of supersedeas, in the full amount of the judgment, would effectively inhibit their ability to appeal." (citing Elaine A. Carlson, *Tort Reform: Redefining the Role of the Court and the Jury*, 47 S. TEX. L. REV. 245, 280 (2005)); Carlson, *supra* note 3, at 49 (speaking to the pre-reform supersedeas framework and noting "a mandatory supersedeas requirement in the amount of a money judgment to stay execution in some instances creates an unreasonable condition impairing the constitutional right of judicial access").

This fighting on two fronts—to win the merits on appeal, and to preserve a life's work from collections<sup>10</sup>—leads to tremendous strife, economic waste, opportunity cost, and satellite litigation. The fighting only wastes time and resources; it benefits absolutely no one—other than plaintiff's attorneys aggressively applying financial pressure on a business litigant to force a settlement *before* an appellate court has an opportunity to review the case's merits.<sup>11</sup> In the majority of cases, the fighting does not benefit the clients represented by such plaintiff's attorneys.<sup>12</sup>

This paper explores in detail the most prevalent problems under Texas's existing supersedeas laws while proposing remedies to those problems by way of either legislative amendments to Section 52.006 or new case law development. The paper proposes turning the largest detriments facing business litigants—namely, (i) sizeable judgment liability and (ii) being land rich and cash poor—into sizeable advantages. The author has not conceived of any of the four remedies by way of pure thought devoid of practical experience; rather, he has applied the suggestions of accounting professionals or has carried to logical conclusion an existing trend under Texas case law.

First and foremost, Texas law should recognize a judgment liability as a balance-sheet liability for the judgment debtor, which will substantially lessen the one-half-of-net-worth amount of judgment security that a business litigant must provide to supersede a money judgment. For reasons that conflict with Generally Accepted Accounting Principles, several Texas appellate courts have refused to recognize a judgment liability as a balance-sheet liability. The judgment liability can harass and beset the business litigant more so than any other liability on its balance sheet. Yet, Texas law ironically does not allow this very real liability to lessen the litigant's net-worth determination. A change here is of paramount importance to aiding smaller Texas businesses and businesspeople facing large money

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10. The fighting to preserve a life's work from collections occurs either by resisting collection efforts with litigation or by providing judgment security under supersedeas laws. In either scenario, the smaller business litigant expends a tremendous amount of money and other resources.

11. This observation about plaintiff's attorneys is entirely descriptive and does not implicate normative ethics. Under the supersedeas laws that this Paper addresses, such attorneys have great economic incentives to apply financial pressure on opponents in order to achieve settlements, when and wherever possible.

12. These clients would benefit more from supersedeas in the form of "alternate security," as discussed in this paper. *See infra* Part III.B.

judgments—and to aligning Texas law with Generally Accepted Accounting Principles.

Second, Texas law should provide a judgment debtor with an absolute right to provide “alternate security” to the more traditional and considerably more expensive options: a bond or a cash deposit in lieu of bond. A Texas business litigant holding substantial real property such as commercial buildings, farmland, or oil and gas interests should be able to give a security interest on that property (for instance, by way of a deed of trust<sup>13</sup>) in favor of the judgment creditor, while still managing the property and collecting earnings from it during the appeal. Or, a Texas business litigant holding substantial personal property such as livestock, farm equipment, common stock, or interests in closely held companies should be able to give security interests under the Uniform Commercial Code (U.C.C.)<sup>14</sup> on that property in favor of the judgment creditor, while retaining the personalty and collecting earnings from it during the appeal. Currently, a business litigant can provide such alternate security only upon obtaining a trial court’s permission. Trial courts frequently do not grant permission.<sup>15</sup> Challenging the trial court’s decision on appeal is fraught with expense and uncertainty—because the appeal steers right into challenging the trial court’s use of “discretion.”<sup>16</sup>

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13. See TEX. PROP. CODE ANN. §§ 51.0001–.016 (detailing substantive rights and procedures for transactions involving deeds of trusts and other liens on realty).

14. See TEX. BUS. & COM. CODE ANN. §§ 9.101–809 (detailing substantive rights and procedures for transactions involving security interests in personalty).

15. After witnessing a judgment debtor’s loss on the merits during a trial or in a hearing, some trial courts might not exercise discretion necessary to aid a judgment debtor’s supersedeas efforts. Further, some trial courts are simply too busy to consider and consequently oversee the alternative, less traditional procedures for easing a judgment debtor’s supersedeas efforts. Additionally, some trial courts abide by the traditional practice of allowing the judgment creditor—the victor on the merits—to assume control over the post-judgment side of the case, including control over judgment collection and supersedeas issues. Regardless, for whatever reason, many trial courts do not exercise discretion in making post-judgment rulings that could ease supersedeas issues for the judgment debtor.

16. For decades, Texas law has trended strongly towards allowing trial courts to use their “discretion” without appellate interferences or disruptions, particularly as to factual determinations, rulings that settle disputed facts, and decisions involving mixed questions of law and fact. See *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (recognizing the Texas Supreme Court’s use of the writ of mandamus to correct clear abuses of discretion by trial courts since the 1950s).

The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court’s action, but “whether the court acted without reference to any guiding rules and principles.” The trial court’s ruling should be reversed only if it was arbitrary or unreasonable.



Third, Texas law should allow a redetermination of the amount of judgment security the judgment debtor must provide when an intermediate appellate court reduces the liability under the original judgment. Currently, business litigants seeking further review in the Texas Supreme Court or United States Supreme Court<sup>17</sup> experience months or years of appellate work while providing security under a reversed or reduced trial court judgment. Business litigants may reduce their judgment-security burdens during an appeal only upon obtaining a trial court's permission, which is discretionary. Once a trial court uses its discretion to deny the judgment-amount redetermination, challenging the trial court's decision on appeal is fraught with expense and uncertainty.

Fourth, Texas law should allow a judgment debtor to subordinate or remove any judgment-related liens (such as abstracts of judgment) that are pending on the debtor's real property so that the debtor may use such property for sales (to raise cash for a supersedeas deposit) or as collateral (to support a supersedeas bond). Currently, business litigants can subordinate or remove judgment-related liens only upon obtaining a trial court's permission. Trial courts may not grant the permission at their discretion. Again, challenging any trial court's discretionary ruling on appeal is fraught with expense and uncertainty.

This paper explores and develops the legal, factual, and practical implications surrounding each of the four proposed reforms. The 2003 reforms to Texas supersedeas laws have served well the business community and commercial litigants; however, this paper's four reforms are necessary to help those business litigants that fall into the interstitial spaces remaining since 2003.

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Cire v. Cummings, 134 S.W.3d 835, 838–39 (Tex. 2004) (citing Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex. 1985)).

17. Although rare, appeals in civil cases involving money judgments can occur from Texas appellate courts to the United States Supreme Court. *See* Apache Corp. v. Moore, 891 S.W.2d 671 (Tex. App.—Amarillo 1994), *vacated*, 517 U.S. 1217, 1217 (1996) (“[P]etition for writ of certiorari is granted. Judgment vacated and case remanded to the Court of Appeals of Texas, Seventh District, for further consideration in light of BMW of North America, Inc. v. Gore . . . .”); Bischoff v. Austin, 662 S.W.2d 156, 156–57 (Tex. App.—Austin 1983), *cert. denied*, 466 U.S. 919 (1984) (involving an attempted appeal from the Austin Court of Appeals to the United States Supreme Court); Los Campeones, Inc. v. Valley Int'l Properties, Inc., 591 S.W.2d 312, 313 (Tex. Civ. App.—Corpus Christi 1979), writ *rePd* n.r.e.) (involving an attempted appeal from the Corpus Christi Court of Appeals to the United States Supreme Court).

## II. THE PROBLEMS UNDER THE EXISTING SUPERSEDEAS LAWS

This paper first must survey in some detail the various problems for small to medium-sized business defendants—here defined as businesses or business people unable to provide as judgment security (i) \$25 million in cash, (ii) a supersedeas bond with a \$25 million face value, or (iii) any other form of supersedeas under the statute and procedural rule, even when they possess substantial unencumbered assets that could serve as judgment security.

### A. *The Acute Insensitivity of Present Supersedeas Laws for Smaller Business Litigation Defendants, Particularly as They Are Found in Texas*

A judgment debtor may supersede the judgment to prevent the execution of a judgment while a case is on appeal.<sup>18</sup> The laws addressing whether, when, and how a judgment debtor may supersede a judgment are called supersedeas laws. In 2003, as part of a broad package of civil justice reforms, the Texas Legislature substantially reformed supersedeas laws, making them more favorable to a judgment debtor seeking to prevent judgment execution during an appeal.<sup>19</sup> The legislature passed a bill (H.B. 4), which (among many civil-justice reforms) promulgated Section 52.006 of the Civil Practice and Remedies Code.<sup>20</sup> Attempting to effect legislative intent and supplementing the Legislature's new law with a procedural framework, the Texas Supreme Court, working with its Rules Advisory Committee, restructured Rule of Appellate Procedure 24.<sup>21</sup> The Texas Supreme Court has supplemented and amended the current Rule 24 in 2008 and in 2018. Presently, Rule 24.1 outlines the four means for supersedeas pending an appeal:

[A] judgment debtor may supersede the judgment by: (1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment; (2) filing with the trial court clerk a good and sufficient bond; (3) making a deposit with the trial court clerk in lieu of a bond; or (4) providing alternate security ordered by the court.<sup>22</sup>

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18. TEX. R. APP. P. 24.1.

19. Carlson, *supra* note 8, at 1069.

20. *Id.* at 1129.

21. *Id.* at 1081.

22. TEX. R. APP. P. 24.1(a); Goggans v. Ford, No. 05-15-00052-CV, 2016 WL 2765033, at \*2 (Tex. App.—Dallas May 11, 2016, pet. denied) (mem. op.) (noting that there are “four methods by

Despite the substantial and admirable 2003 reform efforts behind Section 52.006 and Rule 24, these supersedeas laws continue to disadvantage small-to-medium-sized business defendants. The statute and procedural rule's many substantive and procedural provisions do not enable a smaller business to readily supersede a judgment during an appeal and, under certain circumstances explained below, actually disadvantage both the judgment debtor *and* the judgment creditor by promoting the dissipation of judgment-debtor assets.<sup>23</sup> Furthermore, the same substantive and procedural provisions provide strong economic incentives for collateral litigation (i.e., trial and appellate work over supersedeas issues) to the main appeal of a case.

The statute and procedural rule's central reform-related provisions are two "caps." A judgment debtor must provide judgment security to supersede a money judgment in the lesser amount of:

- (1) 50 percent of the judgment debtor's net worth; or
- (2) \$25 million.<sup>24</sup>

For instance, if a judgment debtor faced a \$30 million judgment, and its "net worth" (i.e., assets less liabilities, as shown on a balance sheet) was \$10 million, then the judgment debtor would need to post security of \$5 million—one half of its net worth. Alternatively, if a judgment debtor faced a \$30 million judgment, and its net worth was \$40 million, then the judgment debtor would need to post security of \$20 million—one half of its net worth. Finally, if a judgment debtor faced a \$30 million judgment, and its net worth was \$100 million, then the judgment debtor would need to post security of \$25 million (the statutory cap)—which is less than one half

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which a judgment may be super[s]eded"). Rule 24.1's requirements are disjunctive—they are independent, alternative ways to supersede the judgment. *See* *City of Dallas v. TCI West End, Inc.*, 463 S.W.3d 53, 58 (Tex. 2015) (per curiam) ("The statute's use of 'or,' a disjunctive, identifies two alternative bases[.]" ); *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 49 (Tex. 2015) ("This distinction between these two concepts is supported 'by use of the disjunctive conjunction 'or' between the two [words], which signifies a separation between two distinct ideas.'" (quoting *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000))). In other words, a party need not show an inability to obtain one type of supersedeas to utilize another method to supersede the judgment.

23. In sum, the current law causes dissipation of judgment-debtor assets by over-emphasizing the usage of a traditional supersedeas bonds or hurried asset sales—both of which are inefficient and costly—instead of more economical means such as "alternate security." Furthermore, the current law creates incentives for parties to litigate heavily over supersedeas issues, which imposes litigation costs on both judgment debtors and creditors.

24. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b)(1)–(2); TEX. R. APP. P. 24.2(a)(1)(A)–(B).

of the \$100 million in net worth and is less than the hypothetical \$30 million judgment. Under any scenario, Texas law, as expressed in intermediate court opinions, does not consider the judgment liability—here, a real and dangerous debt of \$30 million—to be a liability for purposes of reducing the debtor’s judgment.<sup>25</sup>

The judgment debtor posts security (whether it be \$25 million or one half of net worth) most commonly by way of (i) a cash deposit in lieu of supersedeas bond or (ii) a supersedeas bond, each of which would be placed with the trial court clerk pending appeal.<sup>26</sup> As for the bond, the process for obtaining one will prove to be expensive, tedious, and often prohibitive. First, the judgment debtor must provide sufficient collateral for a letter of credit from a reputable bank, then the judgment debtor must pay such bank several points over a prime rate per annum for the letter of credit. Next, the judgment debtor must find a surety company willing to issue a supersedeas bond against the letter of credit. Finally, the judgment debtor must pay the surety company a substantial per-annum fee for the bond. The process can take several months, even when willing banks and surety companies are eagerly working to complete the transaction. Moreover, rarely do banks and surety companies wish to accept such a transaction, which necessarily involves litigation risk.

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25. The Texas Supreme Court has not yet addressed whether a judgment liability, as a balance-sheet liability, would lessen a judgment debtor’s net worth. However, several intermediate courts have concluded that a judgment liability does not lessen net worth. *See McCullough v. Scarbrough Medlin & Assocs.*, 362 S.W.3d 847, 849 (Tex. App.—Dallas 2012, orig. proceeding [mand. denied]) (“[R]ule 24.2 specifically refers to the judgment debtor’s current net worth, which by definition does not include contingent assets or liabilities. As this Court has previously stated, ‘the plain language of the statute [TEX. CIV. PRAC. & REM. CODE § 52.006] does not include a contingent money judgment in calculating net worth.’” (citation omitted) (quoting *Anderton v. Cawley*, 326 S.W.3d 725, 726 (Tex. App.—Dallas 2010, no pet.)); *see also* *O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, 525 S.W.3d 822, 831 (Tex. App.—Houston [14th Dist.] 2017, [mand. denied]) (“In light of the evidence before the trial court and absent any authority to the contrary, we cannot say the trial abused its discretion in excluding the judgment.”); *Ashmore v. JMS Constr.*, No. 05-15-00537-CV, 2016 WL 4437009, at \*2–3 (Tex. App.—Dallas Aug. 22, 2016, no pet.) (mem. op.) (“On the record before this Court, we conclude the trial court did not abuse its discretion in excluding the two prior judgments as liabilities in determining Ashmore’s net worth.”); *Business Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 187–88 (Tex. App.—El Paso 2012, orig. proceeding [mand. denied]) (per curiam) (“The trial court properly determined that because the judgment is a contingent liability it would not be included in the net worth calculation.”); *Montelongo v. Exit Stage Left, Inc.*, 293 S.W.3d 294, 299 (Tex. App.—El Paso 2009, orig. proceeding [mand. denied]) (refusing to view a judgment liability as a balance-sheet liability for purposes of determining net worth).

26. TEX. R. APP. P. 24.1.

Although a large, publicly-traded corporation may have the means to part with \$25 million (as a cash deposit or as bond collateral) in order to supersede a substantial money judgment pending appeal, a smaller business defendant likely lacks the cash liquidity and financial wherewithal to do so. The \$25 million deposit is insurmountable to the vast majority of business defendants in the Texas civil justice system. This provision of the 2003 reforms does not help most businesses in Texas that need to appeal a substantial money judgment.

Likewise, capping judgment-suspension security at fifty percent of net worth does not help most businesses in Texas that need to appeal a civil judgment. A typical Texas business defendant—such as a smaller oil producer, an agricultural business, a doctor in an urban area, or a home contractor—would have a net worth ranging from \$1 million to \$20 million. The same defendant's net worth would depend heavily on some form of real estate: undeveloped land, farmland, commercial buildings, houses, or oil and gas interests. The typical Texan civil defendant, in other words, has much more in the way of non-liquid real estate assets than cash or cash equivalents.

Real estate assets often do not enable judgment debtors to meet the post-2003 Texas requirements for superseding a civil judgment for the recovery of money. Real estate assets are difficult to sell quickly in order to raise money for a cash deposit<sup>27</sup>—especially a sizeable cash deposit equaling one-half of the business's net worth.

Also, although banks may take real estate collateral for purposes of ordinary business transactions, most banks are very resistant to taking such collateral for the unusual transaction of issuing a letter of credit to secure a supersedeas bond. Most banks do not appreciate (or even wish to learn) the risk profile of a civil appeal. Banks are very likely to decline outright a judgment debtor's request for a letter of credit on real estate for purposes of a supersedeas bond.

Further problems confront a judgment debtor attempting to use real estate assets to supersede a judgment. The judgment creditors (plaintiffs) often obtain judgment liens, such as abstracts of judgment, on judgment

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27. A recent example of economic waste from a quick sale of real property appears in *Cruz v. Ghani*, No. 05-17-00566-CV, 2018 WL 6566642 (Tex. App.—Dallas Dec. 13, 2018, pet. denied) (mem. op). The judgment creditor, having obtained a writ of execution, had caused a levy sale of the debtor's Fort Worth condominium on Tarrant County's courthouse steps. *Id.* at \*23. A fortunate buyer acquired the condominium for a mere \$25,000, but the parties stipulated that its market value at the time of sale was \$217,500. *Id.*

debtors' real estate assets. Judgment debtors, consequently, must litigate in the trial court and appellate court whether such liens can be subordinated to the banks' security interests for purposes of obtaining letters of credit. Otherwise, they must litigate whether such liens can be removed for purposes of a real estate sale.<sup>28</sup> Also, the press or media exposure on a large jury verdict and civil judgment will dissuade real estate buyers, banks, and surety companies from entertaining any business from a judgment debtor seen as controversial or high-profile, even those with the willingness to conduct supersedeas business on real estate assets. A great stigma attaches to a judgment debtor that has just lost a trial involving high-stakes dollar amounts.

The statute's and procedural rule's central reform-related provisions often fail to help smaller businesses, as shown by these recent cases: *Hardwick v. Smith Energy Co.*,<sup>29</sup> *Cruz v. Ghani*,<sup>30</sup> and *Stephens v. Three Finger Black Shale P'ship*.<sup>31</sup> Each case has experienced or is still experiencing supersedeas-related litigation that equals or exceeds the work on the appeal of the underlying case's merits.

*Hardwick* has seen a judgment debtor's bankruptcy pending appeal even though the same judgment debtor later won virtually the entire appeal and thereby ridded himself of all significant monetary liability. The judgment debtor first had to obtain a bankruptcy court's permission to pursue his appeal in the Texas courts, which was ultimately quite successful.<sup>32</sup> The helter-skelter nature of Texas state proceedings and bankruptcy proceedings resulted in the judgment debtor's filing a malpractice lawsuit against some of his original trial counsel. This malpractice action remained unresolved for several years.

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28. *E.g.*, *Stephens v. Three Finger Black Shale P'ship*, No. 11-16-00177-CV, 2017 WL 3495390, at \*1-2 (Tex. App.—Eastland Mar. 23, 2017, no pet.) (per curiam) (holding a trial court abused its discretion in refusing a judgment creditor's request to subordinate judgment liens to security interests of a bank willing to provide a letter of credit for a supersedeas bond). *See also* TEX. PROP. CODE ANN. § 52.011 (prescribing rules for when a judgment lien does not encumber real property).

29. *Hardwick v. Smith Energy Co.*, 500 S.W.3d 474 (Tex. App.—Amarillo 2016, pet. granted, judgment vacated w.r.m.).

30. *Cruz v. Ghani*, No. 05-17-00566-CV, 2018 WL 6566642 (Tex. App.—Dallas Dec. 13, 2018, pet. filed) (mem. op.).

31. *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687 (Tex. App.—Eastland 2019, no pet.).

32. Before the appeal, Defendant Mark Hardwick faced a judgment liability of over \$8.5 million; after the Amarillo Court of Appeals' decision that liability had fallen to just \$79,428. *Hardwick*, 500 S.W.3d at 478-79, 486-88.

*Ghani*<sup>33</sup> has seen the selling of a judgment debtor's real property (a Fort Worth condominium) pending appeal, even though the same judgment debtor substantially prevailed on appeal. As the Dallas Court of Appeals observed,

[T]he judgment debtor] appealed, but did not supersede the judgment. While [his] appeal was pending, [the judgment creditor] obtained a writ of execution and caused a condominium owned by [the judgment debtor] to be sold for \$25,000. After the execution sale, [the Dallas Court of Appeals] reversed the judgment on which execution issued. On remand, [the judgment debtor] asserted a counterclaim for wrongful execution, which [the judgment creditor] generally denied. The trial court rendered judgment that [the judgment debtor] recover \$217,500, the stipulated fair market value of [the judgment debtor's] condominium at the time of the execution sale, on his counterclaim.<sup>34</sup>

Yet, multi-year litigation over the wrongful sale of the condominium must continue in light of the Dallas Court of Appeals' reversal and remand on the \$217,500 award. The trial court now must entertain an evidentiary hearing on the condominium sale before determining whether the judgment debtor can recover its fair market value from the judgment creditor.<sup>35</sup>

*Stephens* has seen at least as much supersedeas-related litigation as appellate work on the case's merits, causing a tremendous wasting of assets for the judgment debtor to use for an appeal. The wasting of assets harms the *Stephens* judgment creditors as well; in the event they prevail at the appeal's conclusion, the expansive collateral litigation (which itself has resulted in two appeals to the Eastland Court of Appeals) caused this particular judgment debtor to expend \$1.25–\$1.5 million in assets in legal fees, supersedeas bond costs, and other transactional costs—which the judgment creditors can no longer collect.

The recent examples of *Hardwick*, *Cruz*, and *Stephens* constitute a mere sampling of the strife, economic waste, satellite litigation, and collateral legal work engendered by the current supersedeas laws—whenever small business defendants cannot readily supersede judgments needing appellate correction.

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33. Mehrdad Ghani was the primary defendant and judgment debtor in *Cruz v. Ghani*. Therefore, this paper refers to the case as *Ghani* in order to highlight the judgment debtor's viewpoint and rights in such civil litigation.

34. *Ghani*, 2018 WL 6566642, at \*23.

35. *Id.* at \*23–24.

B. *The Problem with Trial-Court Discretion in Present Supersedeas Practice, and the Difficulty of Obtaining Appellate Relief*

Beyond the two central reform-related provisions of the statute and the procedural rule—that is, the two caps—three additional provisions of both the statute and the procedural rule seek to aid judgment debtors to achieve supersedeas pending appeal, and three provisions of the procedural rule (which do not appear in the statute) seek to aid judgment debtors to achieve supersedeas pending appeal. These six other provisions—which function independently of the \$25 million cap or the half-of-net-worth cap—fail to help most businesses in Texas that need to appeal a civil judgment. Each of these provisions depends on or steers into “trial court discretion”—that is, an appellate court’s strong inclination to allow a trial court to help a judgment debtor to supersede a judgment without appellate interference. Consequently, to obtain assistance by way of one of the following six other provisions, the judgment debtor must convince the trial court—the very court that imposed a judgment on the judgment debtor—to take an extraordinary action for purposes of helping the judgment debtor. Chances are slim the judgment debtor will obtain relief.

First, both the statute and the procedural rule require a lesser amount of judgment security in the event the \$25 million cap or the half-of-net-worth cap (whichever applies) presents “substantial economic harm” to the judgment debtor.<sup>36</sup> Although the statute and procedural rule use mandatory language—“the trial court *shall* lower” or “*must* lower”—both give the trial court discretion *not* to lower the security required by the caps unless and until the trial court finds “substantial economic harm” to the debtor. Using its powerful discretion, the trial court may conclude at will that the judgment debtor has suffered or will suffer no substantial economic harm and, thus, should not receive the benefits of a lesser amount of judgment security.<sup>37</sup> So much for the mandatory language “shall” and “must.”

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36. See TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(c) (“On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm if required to post security in an amount required [by the caps], the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.”); TEX. R. APP. P. 24.2(b) (“The trial court must lower the amount of security required [by the caps] 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, deposit, or security in the amount required [by the caps] is likely to cause the judgment debtor substantial economic harm.”).

37. A trial court, which may already have shown its wariness of (or downright dislike of) a judgment debtor, has many facts under Texas law that it may use in order to find that no economic harm has occurred. See *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Fenge) L.L.C.*, 171 S.W.3d 905, 917



Challenging the trial court's discretion on appeal—by showing that the judgment debtor has suffered substantial economic harm when a trial court has found otherwise—constitutes an expensive and nearly impossible task for the judgment debtor. Struggling in an appellate court against the dense Texas case law that practically ensconces a trial court's discretion typically results in failure for the judgment debtor.<sup>38</sup>

Second, both the statute and the procedural rule forbid a trial court's disruption of a judgment debtor's handling of its assets "in the normal course of business."<sup>39</sup> The "normal course of business" protection is very limited; Section 52.006(e) applies the protection only in the narrow circumstance of curtailing a trial court's injunctive orders that regulate asset dissipation/transference. The protection, therefore, does not generally aid a judgment debtor unable to post security in the amount of \$25 million or one-

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(Tex. App.—Houston [14th Dist.] 2005, no pet.) (reviewing a judgment debtor's claim of "substantial economic harm" by looking at "[h]ow much cash or other resources would it take to post a supersedeas bond in the amount in question? Does the judgment debtor have sufficient cash or other assets on hand to post a supersedeas bond in this amount or to post a deposit in lieu of bond in this amount? Does the judgment debtor have any other source of funds available? Does the judgment debtor have the ability to borrow funds to post the requisite security? Does the judgment debtor have unencumbered assets to sell or pledge? What economic impact is such a transaction likely to have on the judgment debtor? Would requiring the judgment debtor to take certain action likely trigger liquidation or bankruptcy or have other harmful consequences?").

38. A small taste of this dense case law follows:

The court of appeals reviews the trial court's supersedeas rulings for an abuse of discretion. *Id.* at 909. In general, "abuse of discretion" means the trial court acted "without reference to any guiding rules or principles." *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). When a party, like a judgment debtor, attacks the legal sufficiency of an adverse finding on an issue on which it had the burden of proof, it must show that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In reviewing such a matter-of-law challenge, the reviewing court first examines the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id.* If there is no evidence to support the finding, the reviewing court then examines the entire record to determine if the contrary proposition is established as a matter of law. *Id.* The issue should be sustained if the contrary proposition is conclusively established. *Id.*; *see, e.g., Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 763-64 (Tex. App.—Dallas 2008, no pet.) (establishing appellants' amount of offset as a matter of law when their evidence was "uncontroverted").

39. *See* CIV. PRAC. & REM. § 52.006(e) ("Nothing in this section prevents a trial court from enjoining the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business."); TEX. R. APP. P. 24.2(d) ("The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.").

half of its net worth cap. Finally, a trial court's decision on the "normal course of business" protection falls under an "abuse of discretion" review, thus presenting all appellate difficulties surveyed above, to an aggrieved judgment debtor.<sup>40</sup>

Third, both the statute and the procedural rule provide for broad appellate review of a trial court's rulings on supersedeas issues, without the hindrance of mandamus procedures.<sup>41</sup> However, such appellate review provides ersatz relief to a judgment debtor suffering from adverse rulings on supersedeas issues; the appeal invariably becomes a battle over trial-court discretion and, consequently, constitutes an expensive and nearly impossible task.

The procedural rule provides three additional protections to a judgment debtor, beyond the \$25 million cap or the half-of-net-worth cap. These three additional protections do not appear in the statute. First, the procedural rule proposes a practical protection, though not a legal right to protection: it proposes that the judgment debtor and judgment creditor may reach a "written agreement . . . for suspending enforcement of the judgment."<sup>42</sup> Accordingly, in the event the judgment debtor and judgment creditor wish to avoid costly supersedeas-related litigation, or in the event the judgment creditor wishes to avoid uncertainty and risk over collection efforts pending appeal,<sup>43</sup> the parties may reach an agreement on supersedeas issues.

40. See *Nelson v. Vernco Constr., Inc.*, 367 S.W.3d 516, 521–22 (Tex. App.—El Paso 2012, no pet.) (per curiam) (acknowledging that an "abuse of discretion" standard of review applies to trial-court decisions under § 52.006(e) and Rule of Appellate Procedure 24.2(d)).

41. See CIV. PRAC. & REM. § 52.006(d) ("An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section."); TEX. R. APP. P. 24.4(a) ("A party may seek review of the trial court's ruling by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case . . .").

42. TEX. R. APP. P. 24.1(a)(1); see generally *Carlson*, *supra* note 8, at 1070 ("Although it has long been the practice that judgment enforcement may be suspended by agreement of the parties, current Appellate Rule 24 expressly acknowledges the propriety and effectiveness of such private agreements. . . . To be enforceable, the agreement suspending enforcement of the trial court's judgment must be in writing, setting forth the terms, and be signed by the parties or their counsel, and filed with the trial court.").

43. Judgment creditors have substantial incentives to proceed with asset collection on judgments that are not superseded. But uncertainties and risks arise for any judgment creditor that has pursued such collections. Namely, whenever a judgment creditor liquidates a judgment debtor's assets and the final judgment is reversed or set aside, then the judgment creditor must compensate the debtor by paying the market value of liquidated assets at the time of sale/disposal. See CIV. PRAC. & REM. § 34.022(a)–(b) ("A person is entitled to recover from the judgment creditor the market value of the

For instance, they may agree that the judgment debtor would not dissipate/transfer assets pending appeal in exchange for the judgment creditor's acceptance of less than the security defined by the \$25 million cap or the half-of-net-worth cap. But judgment debtors have no right to obtain agreements for posting security that is less than what the caps require, and they cannot appeal a judgment creditor's refusal to enter such an agreement.

Second, the procedural rule, but not the statute, provides that the trial court may order "alternate security" to an agreement by the parties, a supersedeas bond, or a cash deposit in lieu of bond.<sup>44</sup> Nevertheless, the "alternate security" provision is nebulous and depends entirely on trial-court discretion, which presents all of the appellate difficulties to an aggrieved judgment debtor that are surveyed above. A judgment creditor has no assurance that a trial court will accept "alternate security" in lieu of a bond or cash deposit in the amount required by the two caps. The same judgment creditor has a negligible chance of success when challenging by appeal a trial court's refusal to accept alternate security. Indeed, a survey of published Texas cases reveals no discernable instances of the parties' using alternate security over the more traditional means of superseding a judgment.<sup>45</sup>

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person's property that has been seized through execution of a writ issued by a court if the judgment on which execution is issued is reversed or set aside but the property has been sold at execution. The amount of recovery is determined by the market value at the time of sale of the property sold."); *Ziemian v. TX Arlington Oaks Apts., Ltd.*, 233 S.W.3d 548, 557 (Tex. App.—Dallas 2007, pet. dismissed) ("[Section 34.022 of the Civil Practice and Remedies Code] appears to presume an execution that was valid at the time it was made, followed by a change in circumstances that would make it unjust for the executing party to retain the value of the property seized."); *Cruz v. Ghani*, No. 05-17-00566-CV, 2018 WL 6566642, at \*23 (Tex. App.—Dallas Dec. 13, 2018, pet. denied) (mem. op.) (evaluating a judgment debtor's obtainment of a \$217,500 market value award for a judgment creditor's wrongful selling of the debtor's condominium for a mere \$25,000). A judgment creditor wishing to avoid this potential liability must be mindful of the onerous consequences of collecting on a judgment that an appellate court ultimately reverses. Such a creditor may seek to enter a Rule 24.1(a)(1) agreement with the judgment debtor.

44. TEX. R. APP. P. 24.1(a)(4).

45. Since the promulgation of the new Rule 24 in 2003, few appellate courts have addressed exactly how a trial court should determine the adequacy of "alternate security"—that is, its specific type and amount—under Rule 24.1(a)(4). The Texas Supreme Court in *In re Smith*, 192 S.W.3d 564 (Tex. 2006) (orig. proceeding), did not address 24.1(a)(4)'s alternate security provision, but did cite with approval to one of its pre-2003 cases holding that a judgment debtor could post \$500,000 in bonds—provided by his insurance carrier—in order to suspend a judgment exceeding \$3.1 million. See *In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006) (orig. proceeding) (citing *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604 (Tex. 1996) (orig. proceeding)) ("[R]eviewing by mandamus a trial court's order permitting the judgment debtor to post alternate security to supersede execution of the judgment."). The Houston Court of Appeals in *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.* in dicta, commented on a trial court's and judgment creditors' shared view that placing title to seven oil and gas

Lastly, the procedural rule, but not the statute, provides that the trial court retains continuing jurisdiction during the appeal in order to “modify the amount or type of security required to continue the suspension of a judgment’s execution”—“if circumstances change.”<sup>46</sup> Whether a trial court modifies the amount or type of security in order to, for instance, require less security than the two caps require, depends entirely on trial-court discretion, which presents all of the appellate difficulties to an aggrieved judgment debtor that are surveyed above.<sup>47</sup> In sum, a judgment creditor lacks a viable right to lower or alter the supersedeas requirements because of alleged (or firmly proven) changed circumstances.<sup>48</sup>

C. *Problems from the Finality of the Appellate Process: Superseding an Ersatz Judgment*

Often, business appellants will win a partial, but not yet final victory on appeal. For instance, in the intermediate appellate court they may obtain a reversal of the majority of money damages that they owe, but further appellate litigation may lie ahead. If any party seeks further review in the Texas Supreme Court or United States Supreme Court, the business appellants (as judgment debtors) must continue to supersede the original judgment from the trial court, despite having obtained an appellate decision substantially reducing their liability under that judgment. The reasoning and authority of the leading commentator<sup>49</sup> on Texas supersedeas law, along

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properties into the court’s registry could constitute adequate alternate security, but that the judgment debtors were not seeking judgment suspension by way of that particular security. *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 919–20, 920 n.8 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

46. TEX. R. APP. P. 24.3(a)(2).

47. *See Haedge v. Cent. Tex. Cattlemen’s Ass’n*, No. 07-15-00368-CV, 2016 WL 836084, at \*2 (Tex. App.—Amarillo Mar. 3, 2016, no pet.) (per curiam) (acknowledging the abuse of discretion standard for review of a trial court’s decisions in setting and modifying supersedeas amounts and conditions).

48. *See* TEX. R. APP. P. 24.3(a)(2) (vesting the trial court with discretion to decide if changes in circumstances support modification of the amount or type of requisite security).

49. *See* Carlson, *supra* note 8, at 1105 (citing Rules of Appellate Procedure and concluding: “[I]here is no authority that empowers the trial court to order an increase or decrease in appellate security premised upon an appellate court judgment when that judgment is subject to further appellate review, and no mandate has issued.”). “[T]he trial court judgment should remain the operative judgment until the appellate process is complete and a judgment is entered by the appellate court and the appellate court issues its mandate requiring recognition and enforcement of its judgment.” *id.* at 1106. Professor Carlson does offer hope to litigants seeking to convince a trial court to increase or decrease appellate security in light of an appellate court judgment that is subject to further review: she cites to an order in “*Harris v. Archer*, No. 07-01-0071-CV, at \*3 (Tex. App.—[Amarillo] 2004, order) (unpublished).” *See*

with the importance of “the mandate” in the Texas Rules of Appellate Procedure,<sup>50</sup> require appellate litigants to supersede original judgments, despite their alteration during an appeal. Presently, there is a lack of direct case law on the continuing obligation to supersede an original judgment that an appellate court has reduced (or increased).<sup>51</sup>

After a victory at the court of appeals, a judgment debtor faces the potential for further appellate litigation before the Texas Supreme Court—which takes many months or several years to conclude. The parties may file successive motions for rehearing (reconsideration) in the intermediate appellate court under Rule of Appellate Procedure 49.<sup>52</sup> The appellate court may take months to reevaluate its initial decision and, if necessary, to refine it by way of a new appellate opinion. Unless the parties (or one of

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*id.* at 1106 n.410 (referencing the significance of *Harris* as an “instance in which an appellate court ordered the modification of the appellate security necessary to continue suspension of the enforcement of a judgment based upon the appellate modification of that judgment”). Concerning *Harris*, none of this case’s accessible formats, as published or available on Westlaw or Lexis, addresses supersedeas issues or the unpublished order. *See Harris v. Archer*, 134 S.W.3d 411 (Tex. App.—Amarillo 2004, pet. denied); *Harris v. Archer*, No. 07-01-0071-CV, 2003 Tex. App. LEXIS 10645 (Tex. App.—Amarillo Dec. 18, 2003, opinion withdrawn); *Harris v. Archer*, No. 07-01-0071-CV, 2003 WL 22971129 (Tex. App.—Amarillo Dec. 9, 2003, no pet.). This paper’s author has no doubt that Professor Carlson’s description of the unpublished order is accurate and correct; but *Harris*—as it is available to practitioners—does not aid litigants seeking to alter judgment security in the midst of an ongoing appeal.

50. Professor Carlson references Rules of Appellate Procedure 24.1, 18.1(a)(1), 18.1(a)(2), 24.1(c)(3), and 51.1(b) in support of her view that a trial court cannot increase or decrease appellate security in light of an appellate court judgment that is subject to further appellate review. Carlson, *supra* note 8, at 1105–06. Of these, the most supportive Rule for her view would be 51.1(b), which provides that “[w]hen the trial court clerk receives the mandate, the appellate court’s judgment must be enforced,” suggesting the trial court and clerk should *not* enforce the appellate judgment until mandate issues. TEX. R. APP. P. 51.1(b). *Compare id.* R. 24.3(a)(2) (“Even after the trial court’s plenary power expires, the trial court has continuing jurisdiction to do the following: . . . if circumstances change, modify the amount or type of security required to continue the suspension of a judgment’s execution.”), *with* Carlson, *supra* note 8, at 1106 (“An appealable judgment, which by its nature may not be enforced until completion of the appellate process, should not be considered a changed circumstance that would support the trial court modification of appellate security.”).

51. Working from analogous cases, legal research will reveal cases in which an appellant litigant must abide by an original trial court judgment until the appellate process is complete and a mandate issues. *See, e.g., In re City of Cresson*, 245 S.W.3d 72, 75 (Tex. App.—Fort Worth 2008, orig. proceeding) (correcting an appellant litigant, the City of Granbury, for taking actions during an ongoing appeal that were allowed by a trial court judgment, which had been superseded and which the appellate court had reversed: “[City litigant’s] admitted activities within the Disputed Tracts are in defiance of the status of the trial court’s judgment as superseded. Accordingly, until the earlier of the issuance of mandate in [the trial court case] or the issuance of a contrary order or judgment of the Supreme Court of Texas, [city litigant] shall be restrained from asserting jurisdiction within the Disputed Tracts or otherwise acting as if its ordinances annexing the Disputed Tracts are valid . . .”).

52. TEX. R. APP. P. 49.1.

them) seeks an appeal to the Texas Supreme Court, the appellate court will issue a mandate to the trial court to enforce its decision, pursuant to Rule of Appellate Procedure 18.<sup>53</sup> Issuance of the mandate routinely takes many weeks or even several months.

Further delaying a mandate's issuance, the parties may seek review in the Texas Supreme Court. Seeking such review requires a two-step process. First, the parties (or one of them) must seek acceptance by the Court to review the case under the Petition for Review procedures of Rule of Appellate Procedure 53.<sup>54</sup> This step may take months to complete; the Texas Supreme Court rarely decides to reject or accept an appeal within only a few weeks. Second, if the Court accepts the appeal, the parties proceed to "full briefing" under Rule of Appellate Procedure 55.<sup>55</sup> During or after full briefing, the court may reject the appeal.<sup>56</sup> Or, the Court may take the briefing under consideration and elect to have oral argument.<sup>57</sup> Conversely, the Court may consider the briefing and issue a decision without oral argument.<sup>58</sup> After the court issues a decision, the parties may proceed to motions for rehearing in the Texas Supreme Court under Rule of Appellate Procedure 64.<sup>59</sup> The foregoing appellate work in the Texas Supreme Court—for a case meriting that Court's attention—can take many months or, more commonly, several years.

During the months or years-long appellate work following an appellate victory that has reduced the judgment liability, the judgment debtor must continue to supersede the security amount demanded by the original judgment—despite the judgments having become a virtual fiction under the pending appellate decision. The judgment debtor will incur the hefty costs of maintaining a supersedeas bond, or other supersedeas-related transactional costs, as the appeal continues.

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53. *Id.* R. 18.1.

54. *Id.* R. 53.1.

55. *Id.* R. 55.1.

56. *See id.* R. 56.1(d) (allowing dismissal of an appeal in the Texas Supreme Court for an "improvident grant").

57. *See, e.g., id.* R. 58.7(b) (allowing for oral argument "either on a party's request or on the Court's own initiative").

58. *See, e.g., id.* R. 59.1 ("If at least six members of the Court so vote, a petition may be granted and an opinion handed down without oral argument.").

59. *See, e.g., id.* R. 64 ("A motion for rehearing may be filed with the Supreme Court clerk within 15 days from the date when the Court renders judgement or makes an order disposing of a petition for review.").

The debtor may argue to the trial court under Rule 24.3(a)(2) that changed circumstances compel a reduction of the security amount (alternatively, the judgment creditor may argue that changed circumstances compel increasing the amount, in the event an appellate decision has imposed greater liability upon the judgment debtor).<sup>60</sup> The trial court may use its discretion to reduce (or increase) the security amount, and challenging that discretion on appeal is unlikely to alter the trial court's decision.<sup>61</sup>

D. *Problems from Pending Judgment Liens Against Real Property:  
Encumbering the Assets Necessary for Supersedeas*

Texas business appellants often own substantial real-estate holdings, such as land, buildings, houses, or oil and gas interests, but may hold few liquid assets to secure a bond or make a cash deposit to supersede a money judgment. Once they become judgment debtors, their opponents, the judgment creditors, frequently will file abstracts of judgment under Chapter 52 of the Property Code<sup>62</sup> and will pursue writs of execution to force levy sales of their real estate holdings and personal property.<sup>63</sup> Abstracts and execution writs create judgment-related liens on real property relatively soon after a trial court renders judgment—quite often *before* judgment debtors can arrange for sales transactions to raise cash deposits, or *before* they can use their real estate as collateral for a bond.

When a judgment debtor is forced to use real estate in order to supersede a judgment, the process of selling the same for cash or using it as bond collateral can take many months. Banks, bond surety companies, and real estate buyers proceed very cautiously and very slowly when entering a transaction related to the landholder's (the judgment debtor's) underlying litigation. Consequently, judgment creditors—eager to collect on a judgment or put financial pressure on judgment debtors—routinely beat

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60. See generally Carlson, *supra* note 8, at 1106 (“Until a final adverse judgment on appeal is rendered, the security continues to serve to supersede the trial court’s judgment. An appealable judgment, which by its nature may not be enforced until completion of the appellate process, should *not* be considered a changed circumstance that would support trial court modification of appellate security.” (emphasis added)).

61. See *id.* at 1059 (“The trial court continues to have the general discretion to ‘make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.’” (quoting Tex. R. App. P. 24.1(e))).

62. See TEX. PROP. CODE ANN. §§ 52.001–.043 (providing substantive rights and procedures for judgment liens).

63. See TEX. R. CIV. P. 621–22, 629–30, 637–39, 646a–50 (providing procedures for judgment execution, including levy sales).

banks, bond surety companies, and real estate buyers to the punch by becoming priority lien holders on judgment-debtor realty long before the others have even begun to act.

Unless a judgment debtor can put a bank, surety company, or buyer in a first lien holder position, the debtor cannot use its real estate holdings in order to raise a cash deposit (after a sale) or to obtain a supersedeas bond (after a collateral transaction for a letter of credit).<sup>64</sup> Abstracts of judgment and levy-sale liens (following writs of execution) put judgment creditors in a first lien holder position—effectively preventing the use of real estate for purposes of a cash deposit or a supersedeas bond.<sup>65</sup>

Just as it may reject the use of real estate as “alternative security” under Rule 24.1(a)(4), the trial court under existing Texas law may use its discretion to reject the judgment debtor’s request for subordination or removal of judgment-related liens for supersedeas purposes.<sup>66</sup> When this happens, a

64. See *Stephens v. Three Finger Black Shale P’ship*, No. 11-16-00177-CV, 2017 WL 3495390, at \*1 (Tex. App.—Eastland Mar. 23, 2017, no pet.) (acknowledging that “judgment-related liens have prevented [judgment debtors] from posting a supersedeas bond” because the bank that would issue the bond’s underlying letter of credit would not accept a lien holder position that was subordinate to the judgment creditor’s first lien holder positions).

65. See *Transcontinental Realty Inv’rs, Inc. v. Orix Capital Mkts. LLC*, 470 S.W.3d 844, 847–48 (Tex. App.—Dallas 2015, no pet.) (“Under Texas law, an abstract of judgment, ‘when it is recorded and indexed . . . constitutes a lien on and attaches to any real property of the defendant, other than real property exempt from seizure or forced sale . . . that is located in the county in which the abstract is recorded and indexed.’” (quoting PROP. § 52.001)).

66. Appellate litigation may arise from the trial court’s rejection of the request for judgment-lien subordination or removal. *E.g.*, *Stephens*, 2017 WL 3495390, at \*1 (holding trial courts may use their discretion to refuse to suspend the judgment based on alternate security). Only one statute addresses the circumstance under which a judgment debtor can obtain the subordination or release of the judgment lien; the statute makes the lien a nullity if the judgment debtor, first, “has posted security as provided by law or is excused by law from posting security” *and*, second, upon the trial court’s finding that “the creation of the lien would not substantially increase the degree to which a judgment creditor’s recovery under the judgment would be secured when balanced against the costs to the defendant after the exhaustion of all appellate remedies.” PROP. § 52.0011(a)(1)–(2) (prescribing rules for when a judgment lien does not encumber real property). The first circumstance does not aid the judgment debtor who cannot post security for one or more of the various reasons addressed by this paper: (i) being land rich, but cash poor; (ii) being unable to make a \$25 million deposit in lieu of supersedeas bond; (iii) being unable to post security at one-half of net worth; (iv) being unable to post “alternate security”; and (v) being unable to obtain the trial court’s leniency on supersedeas matters. The second circumstance entails a nebulous balancing test—conducted by the trial court, which may be hostile to the judgment debtor—between “the degree to which a judgment creditor’s recovery under the judgment would be secured” and “the costs to the defendant after the exhaustion of all appellate remedies.” PROP. § 52.0011(a)(2). The second circumstance, therefore, hurls the judgment debtor into trial-court discretion, with all attendant uncertainties and costs. Making matters worse, some Texas cases hold that courts of appeals lack jurisdiction to review trial court orders under the statute.



judgment debtor must appeal the trial court's decision under an abuse-of-discretion standard, with all of the appellate uncertainty surrounding a challenge to a trial-court discretion.<sup>67</sup>

### III. PROPOSED REFORMS TO SECTION 52.006, OR NEW CASE-LAW CONSTRUCTIONS FOR IT

Below are four proposed reforms to Texas supersedeas laws for the benefit of small to medium-sized business defendants. All four reforms would begin first with an amendment to the existing text of Section 52.006. Then, working with the Rules Advisory Committee, the Texas Supreme Court would amend the existing Rule of Appellate Procedure 24 to reflect amendments to the statute.

Alternatively, the Texas Supreme Court or courts of appeals could implement the reforms urged by this paper by way of case law. However, creating or shaping law by means of case development is gradual and meandering, at best—requiring good opportunities (cases involving the appropriate facts and context) and good appellate lawyering (specifically, lawyers prepared to argue vigorously for this paper's reforms and lawyers prepared to argue just as vigorously against them) so that appellate courts benefit from a strong adversarial process.<sup>68</sup> The problems of case law development become even more challenging with technical, procedural points of law, such as those appearing in the proposed reforms below.<sup>69</sup> Those courts that have ruled contrary to the first reform below,<sup>70</sup> which

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*See, e.g., Transcontinental Realty*, 470 S.W.3d at 847–48 (addressing Section 52.0011 and rejecting the judgment debtor's argument that “the power conferred on appellate courts by [S]ection 52.006 of the Texas Civil Practice and Remedies Code and rule 24.4 of the Texas Rules of Appellate Procedure to review the amount and type of security required to suspend enforcement of judgment provides an independent basis for appellate jurisdiction”).

67. *See Stephens*, 2017 WL 3495390, at \*1 (“The record indicates that the real property upon which the judgment creditors have obtained judgment liens and have begun execution is the only means available to the [judgment debtors] to supersede the judgment . . . [W]e believe that the trial court abused its discretion when it refused to enter an order to subordinate the judgment liens or release the abstracts of judgment as necessary to permit the [judgment debtors] to supersede the judgment while, at the same time, protecting the judgment creditors.”).

68. *Cf. PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 90 (Tex. 2004) (avoiding substantive-law rulings that could “skew[] the adversarial process” in future cases); *Pease v. Principal Residential Mortg., Inc.*, No. 03-02-00491-CV, 2004 WL 1065639, at \*10–11 (Tex. App.—Austin May 13, 2004, no pet.) (mem. op.) (praising the adversarial process for purposes of testing facts).

69. *See infra* Part III.

70. *See supra* note 25 and accompanying text.

proposes allowing a judgment liability to lessen net worth, and the court that has ruled contrary to the second reform,<sup>71</sup> which proposes an absolute right for alternate security, would have to grapple with the stare decisis effects of their prior opinions.<sup>72</sup> Additionally, all Texas appellate courts, including the highest court, would have to reconsider allowing trial courts to have as much discretion as they currently have to resolve supersedeas issues; as explained earlier, trial-court discretion can prevent defendants from benefitting from several 2003 supersedeas reforms.<sup>73</sup> Therefore, this paper advocates for statutory reform in a future Texas legislative session over case law development—although the paper below references potential areas for case-law development when appropriate.

For each of the reforms below, the paper already has described the underlying problem for which the reform is a remedy.<sup>74</sup> However, the paper gives more substantial attention to and writing on the first reform—the deeming of a judgment liability to be a balance-sheet liability. The paper must explain the accounting background for the underlying problem, and the accounting profession’s viewpoint on this problem—which is quite different from, but superior to, Texas law’s existing viewpoint.

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71. The Eastland Court of Appeals, before its opinion in *Stephens*, issued an order denying the judgment debtor’s request to provide alternate security under Rule of Appellate Procedure 24.1(a)(4). See *Stephens*, 2017 WL 3495390, at \*1 (“On October 27, 2016, this court previously denied movants’ first motion for review under Rule 24.4, in which movants sought to post real property as alternate security.”).

72. Texas appellate courts, of course, can and do overrule their earlier decisions or modify them significantly; however, they must remain cognizant of the policy reasons underlying stare decisis and the law’s presumption in favor of settled case law. See generally *Weiner v. Wasson*, 900 S.W.2d 316, 320–21 (Tex. 1995) (“Of course, we have, on occasion and for compelling reasons, overruled our earlier decisions . . . . Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants . . . who have justifiably relied on the principles articulated in [settled case law]. Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process that differs dramatically from that properly employed by the political branches of government.” (citations omitted)); *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979) (“[I]he doctrine of stare decisis does not stand as an insurmountable bar to overruling precedent. Stare decisis prevents change for the sake of change; it does not prevent any change at all. It creates a strong presumption in favor of the established law; it does not render that law immutable. Indeed, the genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly.”).

73. See *supra* Part II.B.

74. See *supra* Part II.

A. *Proposed Reform No. 1: Include the Civil Judgment as an Existing Liability for Purposes of Determining “Net Worth,” as Generally Accepted Accounting Principles Prescribe*

Allowing a judgment debtor to post security at fifty percent of the judgment debtor's net worth is one of the central provisions in the statute and procedural rule's 2003 reforms. The procedural rule provides a comprehensive procedure for when and how a judgment debtor proves its “net worth” for purposes of calculating fifty percent of the same. First, “net worth is calculated as the difference between total assets and total liabilities as determined by Generally Accepted Accounting Principles (GAAP).”<sup>75</sup> A judgment debtor providing a bond, deposit, or security under Rule 24.2(a)(1)(A) must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's asset and liabilities from which net worth can be ascertained.<sup>76</sup> The affidavit is prima facie evidence of the debtor's net worth.<sup>77</sup>

Next, a judgment creditor may file a contest to the debtor's affidavit of net worth.<sup>78</sup> At the hearing on the judgment creditor's contest, the judgment debtor has the burden of proving net worth.<sup>79</sup> The trial court is required to issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.<sup>80</sup>

Finally—as with most contested decisions over supersedeas issues—an appellate court reviews the trial court's net worth determination under an abuse of discretion standard.<sup>81</sup> An aggrieved judgment debtor, hoping to revise down its net worth by appeal, stands little chance of success.<sup>82</sup>

Presumably, requiring a judgment debtor to post security at fifty percent of net worth would burden the debtor less than requiring it to post security at one hundred percent of net worth, the full judgment amount, or at \$25 million (the other “cap” amount). In certain cases, the lessened burden would certainly occur: for instance, if the judgment were for \$30 million,

75. *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 305 (Tex. App.—El Paso 2009, no pet.); *G.M. Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.).

76. TEX. R. APP. P. 24.2(c)(1).

77. *Id.*

78. *Id.* R. 24.2(c)(2).

79. *Id.* R. 24.2(c)(3).

80. *Id.*

81. *Clayton*, 293 S.W.3d at 305; *Rodgers*, 204 S.W.3d at 840.

82. *See, e.g., O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, 525 S.W.3d 822, 831 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (providing another example of an appellate court's refusal to disrupt a trial court's discretion on a net-worth determination).

and the debtor's net worth was \$500,000, then the debtor would benefit greatly from posting security at \$250,000 instead of either \$30 million or \$25 million.

However, requiring security at fifty percent of net worth does not benefit a judgment creditor whose assets consist primarily of real estate or other non-cash holdings, against which banks will not readily issue letters of credit to support supersedeas bonds. Further, even for a relatively low net-worth valuation—such as the foregoing \$250,000 example—most banks hesitate to enter any financing transaction involving litigation risk, such as an appeal of a civil judgment. Even banks that are normally comfortable with real estate-based financing become quite resistant to any financing transaction involving the risks of litigation or appeals.

A trial court, which may be hostile to the judgment debtor, holds almost complete control over the net worth determination. A trial court—having just rendered a substantial judgment against the judgment debtor—often presents tremendous net worth-related challenges for the smaller business defendant seeking to supersede a judgment pending appeal.

One solution to the onerous net worth cap utilizes GAAP's very definition of "net worth"—which is the legal standard under the statute and the procedural rule.<sup>83</sup> GAAP defines "net worth" by working from the accounting perspective on a "balance sheet"—the proverbial left side of which shows a business's total asset holdings, and the right side of which, which must "balance" (i.e., equal) the total asset value, shows the business's total liabilities and total equity.<sup>84</sup> "[A] balance sheet, sometimes referred to

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83. See *Clayton*, 293 S.W.3d at 305 (indicating that pursuant to Rule of Appellate Procedure 24.2 "[n]et worth is calculated as the difference between total assets and total liabilities as determined by Generally Accepted Accounting Principles (GAAP)"); see also *Business Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 186 (Tex. App.—El Paso 2012, orig. proceeding [mand. denied]) (per curiam) (stating net worth is "calculated as the difference between total assets and total liabilities as determined by [GAAP:]"); *Anderton v. Cawley*, 326 S.W.3d 725, 726 (Tex. App.—Dallas 2010, orig. proceeding [mand. denied]) (using the GAAP definition to calculate net worth); *Montelongo v. Exit Stage Left, Inc.*, 293 S.W.3d 294, 297 (Tex. App.—El Paso 2009, no pet.) (holding Texas law follows the GAAP definition of net worth for purposes of the statute, the procedural rule, or both).

84. DONALD E. KIESO ET AL., *INTERMEDIATE ACCOUNTING* 65–67, 183 (12th ed. 2007). Many Accountants speak of the balance sheet, which they reference more formally as the statement of financial position, in terms of its "right side" and "left side"—a remnant from days when accountants prepared a document with a horizontal (or landscape) formatting from a business's general ledger. Old style balance sheets, or even modern ones printed from accounting software, often show on the left side the total assets, and on the right side the total liabilities and total equity. The two sides must balance because assets (the left side) must equal liabilities and equity (the right side). See generally *id.* at 64 ("Increases to all asset and expense accounts occur on the left (or debit side) and decreases on the

as the statement of financial position, reports the assets, liabilities and [owner's] equity of a business enterprise at a specific date."<sup>85</sup> A balance sheet reveals a person's or entity's net worth by utilizing the accounting formula of assets minus liabilities equal equity—that is to say, assets minus liabilities equal net worth.<sup>86</sup>

As can happen, the law's treatment of a business transaction or event can differ substantially from the business world's treatment of the same transaction or event. Here, the business world, best embodied by the principles in GAAP, treats judgment liabilities very differently from Texas law.<sup>87</sup> GAAP accounting does not view a civil judgment liability—especially one on the cusp of enforcement—as an improbable, vague, or remote liability. GAAP accounting does not view a civil judgment liability as unworthy of inclusion on the balance sheet, as several Texas intermediate courts of appeals have. Rather, GAAP accounting puts the liability on the balance sheet and, accordingly, lessens the judgment debtor's overall net worth.<sup>88</sup>

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right (or credit side). Conversely, increases to all liability and revenue accounts occur on the right (or credit side) and decreases on the left (or debit side).").

85. *Id.* at 170.

86. *See, e.g.,* Carlson, *supra* note 8, at 1081 (“The classic textbook definition of net worth is assets less liabilities.”); *Balance Sheet*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “balance sheet” to mean “[a] statement of financial position of any economic unit, disclosing as at a given moment of time, the value of its assets, liabilities, and equity of the owners in conformity with generally accepted accounting principles”); *Net Worth*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “net worth” to mean “[t]he excess of total assets over total liabilities.”).

87. *Compare supra* note 25 and accompanying text, *with* 2018 Annual Report (Form 10-K) for Johnson & Johnson (Feb. 20, 2019), at 33 (“Johnson & Johnson and certain of its subsidiaries are involved in various lawsuits and claims regarding product liability, intellectual property, commercial and other matters; governmental investigations; and other legal proceedings that arise from time to time in the ordinary course of business. The Company records accruals for loss contingencies associated with these legal matters when *it is probable that a liability will be incurred and the amount of the loss can be reasonably estimated.* The Company has accrued for certain litigation matters and continues to monitor each related legal issue and adjust accruals for new information and further developments in accordance with Accounting Standards Codification (ASC) 450-20-25 [a GAAP rule, discussed *infra* Part III.A.2].” (emphasis added)). *See also* 2018 Annual Report (Form 10-K) for Exxon Mobil Corp. (Feb. 27, 2019), at 62 (“A variety of claims have been made against the Corporation and certain of its consolidated subsidiaries in a number of pending lawsuits. . . . The Corporation accrues an undiscounted liability for those contingencies where the incurrence of a loss is probable, and the amount can be reasonably estimated. . . . The Corporation revises such accruals in light of new information. For contingencies where an unfavorable outcome is reasonably possible and which are significant, the Corporation discloses the nature of the contingency and, where feasible, an estimate of the possible loss.” (emphasis added)).

88. *See supra* note 87; KIESO ET AL., *supra* note 84, at 64 (noting that “increases to all liability and revenue accounts occur on the right (or credit side) and decreases on the left (or debit side),” effectively decreasing net equity).

Indeed, the judgment debtor would be committing fraud and securities-laws violations in the business world if it failed to disclose to creditors, banks, auditors, shareholders, or business partners the judgment's nature and severity as a true liability, or if it failed to include the liability as a balance-sheet liability.<sup>89</sup> The judgment debtor's attorneys with knowledge of the judgment liability have weighty ethical responsibilities to disclose the liability to a company's auditors when asked and to encourage the company to disclose the liability fully to directors, shareholders, other stakeholders, and regulatory officials for reporting purposes.<sup>90</sup>

Texas law's refusal to acknowledge a judgment liability as a balance-sheet liability, or even to inform trial-court discretion on whether this liability should go on the balance sheet, conflicts greatly with GAAP viewpoint and practice. A more sensible practice would be to include judgment liabilities on balance sheets, thereby lessening judgment debtors' net worths by them.

#### 1. A Judgment Liability Is Not So "Contingent" to Merit Exclusion from a Judgment Debtor's Balance Sheet

By operation of common law, Texas law excludes from the net-worth calculation the actual judgment that the judgment debtor is appealing. This common law results from the decisions of several intermediate Texas appellate courts.<sup>91</sup> The Texas Supreme Court has not addressed the issue.<sup>92</sup>

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89. Indeed, a publicly traded company under audit must disclose on a balance sheet even *unasserted* possible legal claims. See CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 12, § 9337, at 2027 (Am. Inst. of Certified Pub. Accountants 1975) ("[T]he ABA Statement of Policy [section 337C] and the understanding between the legal and accounting professions assumes that the lawyer, under certain circumstances, will advise and consult with the client concerning the client's obligation to make financial statement disclosure with respect to unasserted possible claims or assessments.").

90. See CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 12, § 337C, at 2003 (Am. Inst. of Certified Pub. Accountants 1975). ("Independent of the scope of his response to the auditor's request for information, the lawyer, depending upon the nature of the matters as to which he is engaged, may have as part of his professional responsibility to his client an obligation to advise the client concerning the need for or advisability of public disclosure of a wide range of events and circumstances. The lawyer has an obligation not knowingly to participate in any violation by the client of the disclosure requirements of the securities laws. In appropriate circumstances, the lawyer also may be required under the Code of Professional Responsibility to resign his engagement if his advice concerning disclosures is disregarded by the client.").

91. See *supra* note 25 and accompanying text.

92. Additionally, federal jurisprudence is unhelpful. Unlike Texas law, a debtor's "net worth" does not necessarily play a role in setting judgment security under federal law, and federal courts have not addressed whether the judgment liability itself lessens such net worth. See, e.g., SEC v. Yun, 208 F.

The intermediate courts addressing the issue have concluded that a civil judgment is a “contingent” liability<sup>93</sup>—that is, a liability that is less inevitable and ascertainable than, for instance, a notes payable for bank debt or an accounts payable to a trade creditor, which are very common liabilities for most businesses. As a contingent liability, these courts have concluded, the judgment would not appear on a balance sheet’s proverbial right side so as to lessen overall net worth.<sup>94</sup> One intermediate court went on to allow a trial court to assess the contingent nature of a judgment liability, suggesting that a trial court could have concluded that the judgment liability was so inevitable and ascertainable that it should lessen net worth—as do other liabilities.<sup>95</sup> But, there is no reported decision in which a trial court has concluded that a judgment liability should go onto a balance sheet so as to lessen overall net worth. All published decisions, rather, have allowed the

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Supp. 2d 1279, 1282–83 (M.D. Fla. 2002) (considering a judgment creditor’s “net worth” under Federal Rule of Civil Procedure 62: “The usual requirement is that a party seeking a stay pending appeal post a full security supersedeas bond. Departure from this rule will be made only in ‘extraordinary circumstances,’ where the moving party ‘objectively demonstrate[s] the reasons for such a departure’” (quoting *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979))).

93. See *McCullough v. Scarbrough Medlin & Assocs.*, 362 S.W.3d 847, 849 (Tex. App.—Dallas 2012, orig. proceeding [mand. denied]) (“[R]ule 24.2 specifically refers to the judgment debtor’s current net worth, which by definition does not include contingent assets or liabilities. See TEX. R. APP. P. 24.2(a)(1)(A). As this Court has previously stated, ‘the plain language of the statute [TEX. CIV. PRAC. & REM. CODE § 52.006] does not include a contingent money judgment in calculating net worth.’” (quoting *Anderton v. Cawley*, 326 S.W.3d 725, 726 (Tex. App.—Dallas 2010, no pet.)); see also *O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, 525 S.W.3d 822, 830–31 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding [mand. denied]) (refusing to deem judgment liability as contingent and therefore reducing net worth); *Business Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 187–88 (Tex. App.—El Paso 2012, orig. proceeding [mand. denied]) (per curiam) (“The trial court properly determined that because the judgment is a contingent liability it would not be included in the net worth calculation.”); *Montelongo v. Exit Stage Left, Inc.*, 293 S.W.3d 294, 299 (Tex. App.—El Paso 2009, orig. proceeding [mand. denied]) (“The trial court determined that because the judgment is a contingent liability and because the homestead is exempt from execution they would not be included in the net worth calculation. We find that the trial court did not abuse its discretion . . .”).

94. As shown *infra* Part III.A.2, GAAP frequently includes on the balance sheet “contingent” liabilities. Deeming a judgment liability to be “contingent” does not necessarily justify its exclusion from the balance sheet.

95. Cf. *O.C.T.G., L.L.P.*, 525 S.W.3d at 831 (“[Judgment debtor] fails to cite any authority supporting its contention that the judgment must be included in the net-worth calculation; indeed, it conceded at the hearing that it is unaware of any such authority. Both parties offered testimony during the hearing as to whether the judgment should be included. As the fact finder, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. In light of the evidence before the trial court and absent any authority to the contrary, we cannot say the trial abused its discretion in excluding the judgment.” (citations omitted)).

trial court to keep the judgment liability off of the balance sheet—because the judgment is allegedly “contingent.”

Texas supersedes law on judgment liabilities is a work in situational irony—a fire station burning to the ground. The trial court, which has effectuated the liability (by rendering judgment following trial, summary judgment, or default judgment), has the power to deem the liability “contingent”—thereby characterizing it as less inevitable and ascertainable than other liabilities facing the judgment debtor. As a legally contingent liability, the judgment liability does not lessen net worth; it is not a recognized liability under Texas law.<sup>96</sup> Yet, the judgment debt’s exclusion from liabilities effectively prevents the judgment debtor from superseding the judgment pending appeal. Having kept the judgment liability off the balance sheet, the same trial court becomes the very instrument for removing the contingent nature of the so-called contingent judgment: the trial court can allow the judgment to destroy the debtor’s overall net worth by making the judgment liability as real, impactful, and deleterious as any liability could possibly be. The trial court can issue process to liquidate the judgment debtor’s inventories, bank accounts, and other personalty within a few weeks of the liability’s creation.<sup>97</sup> Indeed, the trial court has power to “order the judgment debtor to turn over nonexempt property that is in the debtor’s possession or is subject to the debtor’s control, together with all documents or records related to the property, to a designated sheriff or constable for execution” and to “appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.”<sup>98</sup> At the same time, the court can oversee judgment liens to cloud title on the debtor’s realty, so that the debtor cannot use such realty to conduct routine business or extraordinary business—like superseding a civil money judgment via a real-estate sale to raise a cash deposit, or via real estate-backed financing for a cash deposit or bond. The court can even force levy sales of the debtor’s land, buildings, oil and gas interests, and personal property by a sheriff or constable.<sup>99</sup> The judgment liability affects the judgment debtor’s assets

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96. *E.g.*, *Business Staffing*, 392 S.W.3d at 188.

97. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a).

98. *Id.* § 31.002(b)(1)–(b)(2).

99. A trial court’s ability to oversee levy sales and general execution on a judgment debtor’s property arises from long-standing, diverse, and powerful procedural rules. *See, e.g.*, *Gordon v. West Houston Trees, Ltd.*, 352 S.W.3d 32, 39 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (“A judgment-holder can foreclose on a judgment lien either through an independent suit or through an execution sale.



much more quickly and directly than would an unsecured accounts payable (a well-recognized balance-sheet liability<sup>100</sup>), which requires a trade creditor over many months or years to conduct litigation and reduce the debt to an enforceable judgment. In sum, the very trial court that has deemed a judgment liability as not certain enough to lessen a judgment debtor's net worth simultaneously can wreck all of the debtor's net worth by overseeing the same liability's strict and prompt enforcement.

Under GAAP standards as promulgated and adopted by the Financial Accounting Standards Board (FASB), the balance sheet would recognize and include a judgment liability as an accounting liability, like notes payable, accounts payable, or other debt.<sup>101</sup> Accordingly, the judgment liability would lessen net worth under the formula of assets equaling both liabilities and equity. The FASB in Statement of Financial Accounting Concepts No. 6 *Elements of Financial Statements*<sup>102</sup> defines a "liability" as follows:

A liability has three essential characteristics: (a) it embodies a *present duty or responsibility* to one or more other entities that entails settlement by probable

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Execution is a method of enforcing a judgment by which a judgment creditor obtains from a court a writ of execution that meets certain requirements and delivers it to a sheriff or constable." See TEX. R. CIV. P. 621, 622 & 629. If the officer follows all appropriate procedures, the property may be sold to satisfy the judgment. See TEX. R. CIV. P. 646a-650." (citations omitted); see also *id.* R. 637 ("When an execution is delivered to an officer he shall proceed without delay to levy the same upon the property of the defendant found within his county not exempt from execution, unless otherwise directed by the plaintiff, his agent or attorney. . . .").

100. E.g., *O.C.T.G., L.L.P.*, 525 S.W.3d at 830 (recognizing a judgment debtor's "payables to affiliates" as a balance-sheet liability under GAAP).

101. FINANCIAL ACCOUNTING STANDARDS BOARD, STATEMENT OF FINANCIAL ACCOUNTING CONCEPT NO. 6, ELEMENTS OF FINANCIAL STATEMENTS at CON6-1 (2008).

102. *Id.* Although it has not yet done so, the FASB has considered updating the definition of "liability" in the *Conceptual Framework-Elements and Recognition*. As of March 15, 2010, the FASB had tentatively adopted the following working definition, subject to final approval of subsequent Exposure Draft Document and Final Standard:

A liability of an entity is a present economic obligation for which the entity is the obligor. Present means that on the date of the financial statements both the economic obligation exists and the entity is the obligor. An economic obligation is an unconditional promise or other requirement to provide or forgo economic resources, including through risk protection. An entity is the obligor if the entity is required to bear the economic obligation and its requirement to bear the economic obligation is enforceable by legal or equivalent means.

Meeting Minutes from Financial Accounting Standards Board Project Team to Board Members, Conceptual Framework (Phase B) Board Meeting 2-3 (Oct. 20, 2008), [https://www.fasb.org/board\\_meeting\\_minutes/10-20-08\\_cf.pdf](https://www.fasb.org/board_meeting_minutes/10-20-08_cf.pdf) [<https://perma.cc/5SN8-KKN9>]. For the time being, however, the definition of "liability" appearing in note 103 *infra* and accompanying text remains the operative GAAP definition.

future transfer or use of assets at a specified or determinable date, on occurrence of a specified event, or on demand, (b) the duty or responsibility *obligates* a particular entity, leaving it *little or no discretion* to avoid the future sacrifice, and (c) the transaction or other event obligating the entity *has already happened*.<sup>103</sup>

Applying the foregoing FASB standard, per (a), a final civil judgment creates a present duty and responsibility upon a litigation defendant to transfer assets, as effectively as any liability could do so. Further, per (b), it leaves little or no discretion for a defendant to avoid the future sacrifice of paying or otherwise satisfying the judgment. Finally, per (c), the judgment results from an event that has already happened—namely, the litigation process that has determined a defendant’s liability for past occurrences. Under GAAP accounting, a judgment liability is as inevitable and ascertainable as a liability can be.<sup>104</sup> Through the operation of the common law or (as this paper urges) by legislative action, Texas law should adopt the GAAP accounting viewpoint on judgment liability.<sup>105</sup>

A civil judgment is “contingent” because an appeal may reverse it in whole or in part, thereby eliminating or changing the amount of debt for the judgment debtor to pay. However, an appeal’s potential effects on a judgment do not transform it into a contingent liability any more so than business developments transform other liabilities into contingent liabilities. GAAP accounting frequently recognizes liabilities with uncertain collection

103. FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, para. 36 at CON6-13 (emphasis added).

104. See *generally id.* para. 39 at CON6-14 (“Although most liabilities result from agreements between entities, some obligations are imposed on entities by government or courts or are accepted to avoid imposition by government or courts (or costly efforts related thereto), and some relate to other nonreciprocal transfers from an entity to one or more other entities.”); *id.* para. 85 at CON6-24 (“Other gains or losses result from nonreciprocal transfers between an entity and other entities that are not its owners—for example, from gifts or donations, from winning a lawsuit, from thefts, and from assessments of fines or damages by courts.”).

105. Texas law, elsewhere, recognizes the finality and certainty of civil judgments. *Scurlock Oil Co. v. Smithwick* provides that a judgment is final for issue and claim preclusion purposes even though an appeal may be pending. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986). Many Texas cases hold that “even though an appeal may be pending, a judgment is final in the sense that execution will issue in the absence of a supersedeas bond.” *Smith v. Texas Farmers Ins. Co.*, 82 S.W.3d 580, 585 (Tex. App.—San Antonio 2002, pet. denied) (citing *Graham v. Thomas D. Murphy Co.*, 497 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1973, writ ref’d n.r.e.)). See also *Ziemian v. TX Arlington Oaks Apartments, Ltd.*, 233 S.W.3d 548, 557 (Tex. App.—Dallas 2007, pet. struck) (“[E]ven though an appeal may be pending, a judgment may be final for certain purposes. For example, a judgment can be final in the sense that execution will issue in the absence of a supersedeas bond.” (citation omitted)).

possibilities as actual liabilities that lessen net worth. For instance, a bank might forego collection activity, such as litigation or selling off secured assets, on a debtor business's notes payable. A trade creditor might write off a debtor business's accounts payable, particularly if collection efforts would be costly and time-consuming. A federal, state, or local taxing authority might provide an accommodation or forgiveness to the taxes that a debtor business owes. Nonetheless, as long as the liability—the notes payable, accounts payable, or taxes payable in these examples—remains a liability on a balance sheet and (potentially) a charge against income,<sup>106</sup> it lessens overall net worth. Until the bank, trade creditor, or taxing authority releases the debt owed, or until the time for payment becomes so attenuated, the liability remains on the balance sheet. GAAP will recognize the liability—despite its contingent nature—because it has the hallmarks of an accounting “liability”: “a present duty or responsibility,” leaving “little to no discretion” to avoid payment or other satisfaction, on transactions that have “already happened.”<sup>107</sup>

## 2. Even If Deemed a “Contingent” Liability, a Judgment Liability Should Lessen Net Income and, Thus, Net Worth

GAAP regularly deems so-called “contingent” liabilities as worthy of impacting net worth. GAAP lessens net worth via charging contingent liabilities against income.<sup>108</sup> The FASB's Accounting Standard Codification (“ASC”) 450 promulgates the accounting standard for

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106. A charge against income on an income statement will lessen overall net worth, just as the inclusion of liability does. See FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, at CON6-2 (“Losses are decreases in equity (net assets) from peripheral or incidental transactions of an entity and from all other transactions and other events and circumstances affecting the entity except those that result from expenses or distributions to owner.”). Indeed, the two accounting entries are flip sides of the same coin; a credit increases a liability account (such as accounts payable), while a debit increases an expense (such as overhead expenses). KIESO ET AL., *supra* note 84, at 64. At reconciliation, when credit and debit entries are closed out for a certain time period, the charges against income (specifically, the expense-related debits) lessen income. *Id.* at 67–68, 85. The positive effects of income (or the negative effects of losses) impact equity on the balance sheet's right side; income, as a type of credit, increases equity – whereas losses, as a type of debit, lessen it. See *id.* at 65, 85; see also FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, at CON6-2 & para. 231 at CON6-50 (explaining transactions resulting in a decrease in equity are losses). Thus, by lessening equity directly, charges against income lessen overall net worth.

107. FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, para. 36 at CON6-13.

108. Because charges against income and inclusions of liabilities are flip sides of the same coin, a credit entry to increase a liability account would be necessary as well. KIESO ET AL., *supra* note 84, at 64–65; FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, para. 231 at CON6-50.

recognizing a contingent liability's effect on net worth. ASC 450 states in relevant part that "an estimated loss from a loss contingency *shall be accrued by a charge to income* if both of the following conditions are met":

- a. Information available before the financial statements are issued or are available to be issued indicates that it is *probable that an asset had been impaired or a liability had been incurred* at the date of the financial statements. Date of the financial statements means the end of the most recent accounting period for which financial statements are being presented. It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss.
- b. The amount of loss can be *reasonably estimated*.<sup>109</sup>

Despite its contingent nature—which arises from the possibility of appellate reversal, or some other litigation development—a judgment liability subject to an appeal is clearly incurred by the business or businessperson bearing the liability, thus satisfying subsection (a). Further, the judgment's financial impact—the potential loss—is reasonably estimable, thus satisfying subsection (b). Under GAAP accounting, a judgment liability would lessen net worth even when litigation parties or courts deem the liability as contingent because of an appeal. Through common law or by legislative action, Texas law should adopt the same GAAP accounting viewpoint.

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109. FINANCIAL ACCOUNTING STANDARDS BOARD, FINANCIAL ACCOUNTING SERIES EXPOSURE DRAFT, CONTINGENCIES (TOPIC 450) 8 (2010) (emphasis added). This "ASC 450" as it is called constitutes the basis for Johnson & Johnson's and Exxon Mobil's accruals of potential—that is, "contingent"—losses from lawsuits and civil judgments, discussed in note 87 *supra*. Frequently, large publicly traded companies do not enter single line-items on their balance sheets to reflect individual judgments, instead grouping them into larger line-items like "Accrued Liabilities" or "Other Liabilities," *e.g.*, 2018 Annual Report (Form 10-K) for Johnson & Johnson (Feb. 20, 2019), at 34—because a reporting regulation allows them to group together, and not report individually, any liability that is five percent or less than total liabilities. 17 C.F.R. § 210.5-02(24). For companies the size of Johnson & Johnson, even multi-billion-dollar judgment liabilities rarely equal or exceed five percent of total liabilities.

3. Relying on the Statute's Failure to Mention "Contingent Money Judgments" Merely Circumvents Meaningful Analysis of a Judgment's Impact on Net Worth and, Moreover, Constitutes Poor Statutory Construction

The intermediate courts addressing a judgment debt's effect on net worth have avoided thinking through the difficult issues; instead, they have concluded that because the statute does not expressly mention judgment liabilities or state that such liabilities affect net worth, those sorts of liabilities must play no role in determining net worth. Specifically, these courts have observed, "[t]he plain language of the statute does not include a contingent money judgment in calculating net worth," and then have excluded summarily the judgment as a balance-sheet debt.<sup>110</sup>

The lack of statutory language on exactly which debts affect net worth should not exclude judgment debts automatically from a net worth determination. The statute does not mention accounts payable or bank debt, yet no published decision has excluded those established GAAP debts from the net worth determination; clearly, under GAAP and under Texas case law, they constitute balance-sheet liabilities that lessen net worth.<sup>111</sup> Accounts payables and bank debt have the indicia of an accounting "liability"; they embody "a present duty or responsibility," leave "little to no discretion" to avoid payment or other satisfaction, and represent transactions that have "already happened."<sup>112</sup>

Concluding that judgment debts could lessen net worth under the statute would constitute a proper, defensible interpretation of the statute's language: "net worth." Indeed, statutes often require court interpretation in order to enhance and flesh out the statutory meaning. This process results in quality statutory construction. When engaging in statutory construction, Texas courts embrace the ultimate purpose of understanding legislative

110. *O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, 525 S.W.3d 822, 831 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding [mand. denied]); *Business Staffing, Inc. v. Jackson Hot Oil Service*, 392 S.W.3d 183, 187–88 (Tex. App.—El Paso 2012, orig. proceeding [mand. denied]); *McCullough v. Scarbrough, Medlin & Assocs.*, 362 S.W.3d 847, 849 (Tex. App.—Dallas 2012, no pet.); *Anderton v. Cawley*, 326 S.W.3d 725, 726 (Tex. App.—Dallas 2010, [mand. denied]).

111. *See O.C.T.G. L.L.P.*, 525 S.W.3d at 830 ("We conclude it was error for the trial court to eliminate [judgment debtor's] payables to affiliates from its net-worth calculation based on the GAAP consolidation rule."); *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 920 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (acknowledging in the context of GAAP debts: "outstanding debt of approximately 75 million pounds to the Bank of Scotland relating to the Seven Heads gas field").

112. FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, para. 36 at CON6-13.

intent,<sup>113</sup> with such understanding arising primarily from the written statutory language.<sup>114</sup> Perhaps the most succinct and oft-quoted summary of the principles underlying Texas statutory construction comes from a landmark 1920 Texas Supreme Court case, as follows:

Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent *in its language, and not elsewhere*. They are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as *the words of the law in their plain sense fairly sanction and will clearly sustain*.<sup>115</sup>

With adherence to ascertaining legislative intent from written statutory language, Texas courts often amplify or restrict the meaning of specific statutory language, with or without citations to legislative deliberations specifically addressing such language. Statutory language can require court interpretation and construction via case law analysis—and that analysis often moves a thinking court far away from the actual, written statutory language at hand. Consider the statute’s phrase “the amount of compensatory damages awarded in the judgment”<sup>116</sup>; the Texas Supreme Court has settled a division in the intermediate courts over whether attorney’s fees awards constitute such “compensatory damages”—concluding that typically they do not and, thus, do not require supersedeas.<sup>117</sup> Most of the court’s analysis in the opinion focused on the

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113. *See Rocor Int’l, Inc. v. Nat’l Union Fire Ins. Co.*, 77 S.W.3d 253, 260 (Tex. 2002) (“When construing statutes, our ultimate purpose is to ascertain the Legislature’s intent. In determining that intent, we may look to the statute’s underlying purpose.” (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999))).

114. *See, e.g., Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (“We must construe statutes as written and, if possible, ascertain legislative intent from the statute’s language.” (citing *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985))).

115. *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) (emphasis added).

116. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a)(1).

117. *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 174, 174–75 (Tex. 2013) (orig. proceeding) (holding that awards of “attorney’s fees incurred in the prosecution or defense of a claim are not compensatory damages” under the statute, even though such awards are compensatory damages in certain contexts).

meaning of “attorney’s fees” and “compensatory damages” in case law and in statutes *other than* the statute the court was directly construing.<sup>118</sup>

Likewise, the Texas Supreme Court has addressed disgorgement style remedies, concluding that disgorgement awards are not “compensatory damages” under the statute and, thus, do not require supersedeas.<sup>119</sup> And, the phrase “the judgment debtor’s net worth”<sup>120</sup> itself required an appellate decision that the Texas Legislature must have meant “the difference between total assets and total liabilities determined in accordance with GAAP,”<sup>121</sup> rather than some alternate financial measure of a business (or business person) as a going concern.<sup>122</sup> Both of these statutory construction opinions included lengthy and well-reasoned analyses of case law and broad legal principles. To that end, each opinion moved far away from the actual, written statutory language at hand.

In the foregoing examples, the reviewing courts engaged in statutory construction of terms of art or of language having a specialized meaning—namely, “the amount of compensatory damages awarded in the judgment”<sup>123</sup> and “the judgment debtor’s net worth”<sup>124</sup> in the statute. The courts did not look to—and should not have looked to—common usage and parlance in order to construe these unique phrases.<sup>125</sup> Rather, the courts had to move away from the actual statutory language at hand and had

118. *See generally id.* at 172–75 (explaining the legislature has never defined attorney’s fees as constituting damages, despite the substantial component of a civil judgment that attorney’s fees comprise).

119. *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (orig. proceeding) (holding disgorgement damages are not under the statute “compensatory damages” requiring supersedeas because “equitable forfeiture ‘is not mainly compensatory . . . nor is it mainly punitive’ and ‘cannot . . . be measured by . . . actual damages’” and “[d]isgorgement is compensatory in the same sense attorney fees, interest, and costs are, but it is not damages” (citing *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999))).

120. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b)(1).

121. *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 915 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

122. *See generally* Letter from Warren E. Buffett to shareholders of Berkshire Hathaway Inc. (Feb. 23, 2019), at 3; Letter from Warren E. Buffett to shareholders of Berkshire Hathaway Inc. (Feb. 26, 2011), at 4, 7 & 8–10 (both distinguishing “book value” valuation metrics, which are functionally equivalent to GAAP “net worth,” from superior valuation metrics that assess “intrinsic value”—specifically, metrics that value businesses in light of their future expected earnings, discounted to present value).

123. *In re Nalle*, 406 S.W.3d at 170, 173–74; *In re Longview Energy Co.*, 464 S.W.3d at 361.

124. *Ramco Oil & Gas, Ltd.*, 171 S.W.3d at 915.

125. *Cf. Baggett v. State*, 367 S.W.3d 525, 528 (Tex. App.—Texarkana 2012, pet. ref’d) (noting when a statutory term “has not acquired a technical meaning and may be interpreted according to its common usage” (quoting *Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012))).

to discuss disparate case law, other statutes, and other legal principles. In effect, the courts were seeking the meaning of these “technical” or “particular” statutory phrases by way of surveying and discussing a broad variety of sources.<sup>126</sup>

A lack of statutory language about judgment debts, therefore, does not constitute a bar to including such debts as balance-sheet debts or as charges against income, either of which would lessen overall net worth. The same lack of statutory language has not acted as a bar to including accounts payable as a balance-sheet liability that lessens net worth. The same lack of statutory language has not kept Texas courts from adopting the GAAP definition of “net worth” in lieu of some other definition.

4. A Judgment Liability May Result in “Negative Net Worth”—  
a Good Means for Adherence to GAAP and for Promoting Litigation  
Efficiencies

Negative net worth occurs whenever a debtor’s total liabilities exceed its total assets.<sup>127</sup> Negative net worth can occur in connection with a balance sheet judgment debt: for instance, if a judgment debtor had a pre-judgment net worth of \$500,000—that is, its total assets exceeded its total liabilities by \$500,000—and the debtor was facing a \$30 million judgment, then GAAP would deem the debtor’s post-judgment net worth as negative \$29,500,000, which is \$500,000 minus \$30 million.

Several of the intermediate appellate courts addressing a judgment debt’s effect on net worth have grappled with a negative net worth scenario.<sup>128</sup> One of these courts stated the judgment creditor’s position that using judgment liability to derive negative net worth can result in absurdity: “[Judgment creditor] argues that taking the judgment into account would produce absurd results because in some cases the judgment would lead to a negative net worth, thereby relieving the judgment debtor of having to deposit any money to suspend enforcement of the judgment.”<sup>129</sup>

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126. See TEX. GOV’T CODE ANN. § 311.011(b) (“Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”).

127. AICPA, FORENSIC AND VALUATION SERVICES PRACTICE AID: PROVIDING BANKRUPTCY AND REORGANIZATION SERVICES 32 (2d ed. 2016) (acknowledging distressed companies may have “[l]ow or negative levels of equity”).

128. See *supra* note 93.

129. *Montelongo v. Exit Stage Left, Inc.*, 293 S.W.3d 294, 296 (Tex. App.—El Paso 2009, orig. proceeding [mand. denied]).



Without question, courts engaging in statutory construction must eschew any construction that leads to an absurd result.<sup>130</sup> However, construing the existing statute so as to allow judgment liabilities to lessen judgment debtors' net worths—even to result in negative net worths—would not produce an absurdity. Likewise, amending the statute to make it express and clear that judgment liabilities can lessen net worths—even to the extent of negative net worths—would not result in absurdity. Since at least 2005, just two years after the existing statute's promulgation, Texas courts have embraced the GAAP measure of “net worth,” namely, the difference between total assets and total liabilities determined in accordance with GAAP.<sup>131</sup> The simple math behind this net worth measure lends itself to the possibility of a negative: if the assets are less than the liabilities, the resulting equity amount (i.e., the net worth) necessarily becomes a negative number, meaning the business owner or businessperson owes more in liabilities than he has in the way of assets.

If, for instance, a business owns \$100,000 in land, \$50,000 in equities and money-market funds, and another \$50,000 in inventories, its assets would total \$200,000. Entirely within the contemplation of GAAP, the same business may have cumulative liabilities of \$300,000 by way of accounts payable, notes payable, long-term debt, and charges against income. Thus, the business would have a negative net worth of \$100,000—more specifically, the business would owe another \$100,000 to creditors even if it sold its assets at book value, thereby realizing \$200,000 in sales proceeds,

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130. *E.g.*, *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) (“[W]e construe the statute’s words according to their plain and common meaning . . . unless such a construction leads to absurd results.” (citations omitted)).

131. The first published opinion in which a Texas appellate court adopted the GAAP measure of “net worth” appears to be the Fourteenth District’s 2005 opinion in *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*. *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 914–15 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The court concluded after looking to federal case law for an understanding of “net worth,” that:

[t]he [l]egislature could have required the trial court to determine the Security Amount based on 50 percent of a judgment debtor’s value, using whatever measure of value the trial court found to be most appropriate. However, the Legislature did not do so; instead, it required that the trial court base this determination on the judgment debtor’s “net worth.” While determining “net worth” under GAAP may be quite complicated and may involve different considerations based on the circumstances of the judgment debtor and based on GAAP, the unambiguous meaning of this term is the difference between total assets and total liabilities determined in accordance with GAAP.

*Id.*

and gave such proceeds to its creditors. This scenario's negative net worth is not an absurd<sup>132</sup> result or an absurd situation. The scenario reflects the actual state of affairs for this particular business in the business world—it simply owes \$100,000 more than its existing assets will cover. Indeed, a business's becoming overly indebted and achieving negative net worth are entirely possible in an American marketplace with plentiful bank financing, eager private-equity financing, and liberal trade credit.

Likewise, a situation where a debtor under judgment liability may have a negative net worth is not an absurd result. The result and the situation, rather, reflect the actual state of affairs for the judgment debtor in the legal system and in the business world—the debtor owes more in the way of judgment debt and business debt than its existing assets will cover. As mentioned earlier, the judgment debtor would potentially commit fraud and securities law violations in the business world if it failed to disclose to creditors, banks, auditors, shareholders, or business partners that a judgment liability had pushed the debtor into negative net worth.<sup>133</sup>

As long as Texas embraces the GAAP measure of net worth, Texas litigants should expect that judgment debtors could have negative net worths, particularly when their business and judgment debts exceed their existing assets. If Texas litigants do not wish for judgment debtors to have negative net worths as a result of their business and judgment debts, then they must urge either the Texas Legislature by statute or the Texas Supreme Court by case law to alter existing Texas law so that the law does not utilize a GAAP measure of net worth or so that it utilizes some modified version of that measure. The current compromise—resulting from those intermediate appellate court opinions that exclude judgments from balance-sheet liabilities<sup>134</sup>—is an untenable one. The compromise does not abide by and, in fact, conflicts with GAAP.

Going beyond the foregoing conclusion—that Texas case law has made its GAAP bed and so must lie in it—good policy flows from the possibility that judgment debtors could have negative net worth as a result of their business and judgment debts. Efficiencies may follow for the litigants, trial courts, and appellate courts. A plaintiff with the possibility of becoming a

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132. See generally *Absurdity*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "absurdity" to mean "[t]he state or quality of being grossly unreasonable; esp., an interpretation that would lead to an unconscionable result, esp. one that the parties or (esp. for a statute) the drafters could not have intended and probably never considered.").

133. See *supra* notes 89–90 and accompanying text.

134. See *supra* note 25 and accompanying text.

judgment creditor will have to consider the scenarios that could result from its litigation efforts: a judgment liability on the defendant that preserves some net worth, thereby obligating the defendant to provide some judgment security, versus a judgment liability on the defendant that wipes out its net worth, thereby relieving the defendant of any supersedeas obligation.<sup>135</sup> The decision before the plaintiff could create disincentives towards overloading the litigation process—and particularly the jury charge<sup>136</sup>—with excessive damages theories and claims for recovery, such as ambitious, creative, and speculative compensatory damages.<sup>137</sup> Such a plaintiff would do better to narrow down its litigation efforts to fewer, higher-quality claims, which a Texas appellate court might actually uphold. Moreover, by narrowing down efforts to fewer claims, such a plaintiff would enhance its ability to obtain judgment security (by way of cash deposits, supersedeas bonds, or other means explored in this paper) because it would not have wiped out the judgment debtor's net worth with an inflated, unsustainable judgment.<sup>138</sup> The policy benefits for the defendant are obvious: the plaintiff may pursue fewer and lower-dollar claims, resulting in less defense costs and less litigation uncertainty and stress. Further, the defendant can more readily supersede a judgment and pursue an appeal.

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135. Plaintiffs frequently know or can closely approximate a defendant's net worth, even before post-judgment discovery. Pre-trial discovery, the plaintiff's pre-suit dealings with the defendant, as well as publicly available information can reveal most of the defendant's assets and can provide substantial insights into the defendant's debts.

136. See, e.g., *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687, 702 (Tex. App.—Eastland 2019, no pet.) (reviewing a “*three-week trial*, [after which] the trial court gave the jury a *69-page jury charge that contained 54 questions, many of which contained multiple parts*” and reversing the great majority of damages claims against the defendants) (emphasis added).

137. Certainly, some cases call for broad-ranging damages theories and claims so that a plaintiff has no choice other than to plead and prove as many means for obtaining damages as are possible. But this is the extreme case, involving truly egregious conduct by a defendant or involving substantial legal or factual complexity. More often, a plaintiff is making a conscious effort to increase damages—for instance, by pleading tort claims into contract cases, or by seeking individual liability on business owners instead of solely entity liability.

138. The salutary effects discussed in this paragraph apply primarily to cases involving the small-to medium-sized business or businessperson. That is, discouraging the pursuit of inflated compensatory damages against large businesses, such as publicly traded corporations and partnerships, makes less policy sense because in 2003 the legislature capped such businesses' supersedeas obligations at \$25 million. TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b)(2). Accordingly, a large business will more likely find aid by way of the \$25 million supersedeas cap than by way of this paper's proposal to include a judgment liability on the balance sheet when determining net worth.

B. *Proposed Reform No. 2: An Absolute Right to “Alternate Security,”  
Which Usually Provides the Best Supersedeas Security for the Parties*

The smaller business defendant in Texas is likely to have substantial real estate holdings and/or personal property with which it can supersede a judgment by means of security interests in real property, such as would arise under deeds of trust or other liens on realty, and by means of U.C.C. security interests on personalty. These sorts of security interests would be in the judgment creditor’s favor, with prescriptions on when the creditor could foreclose and sell the assets.<sup>139</sup>

Such “alternate security” is preferable to either a bond or cash deposit; alternate security avoids the transactional costs of financing a bond or selling real estate to raise a cash deposit. Avoiding these transactional costs benefits the judgment debtor by preserving its resources for the appeal and for regular business; it also benefits the judgment creditor by preserving assets against which the creditor can collect following the appeal’s conclusion. For instance, a judgment creditor with a deed of trust to an unencumbered \$5 million in real estate of the judgment debtor—when the debtor has not expended cash on a bond and has not expended resources in supersedeas-related litigation—holds far better judgment security than the judgment creditor that has forced the debtor to hastily sell assets in order to raise a cash deposit.<sup>140</sup> The same judgment creditor is better off than one that has

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139. Deeds of trust, for instance, contain terms under which a creditor (usually a bank) can foreclose on realty and sell the same for cash proceeds (usually upon the debtor’s failure to pay a debt). *See, e.g.*, TEX. PROP. CODE ANN. § 51.002 (prescribing procedures for “a sale of real property under a power of sale conferred by a deed of trust or other contract lien”). Security agreements accompanying U.C.C. financing statements contain terms under which a secured party can sell a debtor’s personalty for cash proceeds. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 9.102(39) (defining a financing statement as “a record or records composed of an initial financial statement and any filed record relating to the initial financing statement.”). When used as alternate security, the terms of the deed of trust or security agreement would specify that the judgment creditor could sell property only upon conclusion of the appellate process, only if and when a final judgment continues to make a defendant (a judgment debtor) liable to a plaintiff (a judgment creditor), and only if and when a defendant does not satisfy the judgment with other means.

140. If the creditor has forced the asset sale via writs of execution or other collections process, the creditor not only has depleted or wasted assets for eventual collection purposes, but also has run the risk of becoming a defendant in satellite litigation over the wrongful selling of the assets. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 34.022(a)–(b) (“A person is entitled to recover from the judgment creditor the market value of the person’s property that has been seized through execution of a writ issued by a court if the judgment on which execution is issued is reversed or set aside but the property has been sold at execution. The amount of recovery is determined by the market value at the time of sale of the property sold.”); *Ziemian v. TX Arlington Oaks Apts., Ltd.*, 233 S.W.3d 548, 557 (Tex. App.—Dallas 2007, pet. dismissed) (“[Section 34.022 of the Civil Practice and Remedies Code] appears

forced the judgment debtor to spend hundreds of thousands annually to maintain a supersedeas bond.

Presently, the judgment debtor (the defendant) would have to seek the trial court's permission to use alternate security instead of the more traditional bond or cash deposit. The trial court has discretion entirely to disallow alternate security, and challenging the trial court's use of discretion in the appellate courts is unlikely to lead to success for the aggrieved defendant.

Addressing alternate security, the leading commentator on the statute and the procedural rule posits as follows:

[A] debtor who lacks the liquidity to post bond but who could pledge sufficient unencumbered assets should establish that value and argue the sufficiency of that protection. . . .

[A] judgment creditor who files its judgment with the clerk in the county where the judgment debtor possesses real property, absent supersedeas, creates a lien on the property. The value of this lien may be sufficient protection so that an additional supersedeas requirement may be excused.<sup>141</sup>

Working from the foregoing framework, amendments to the statute should allow a judgment debtor to provide a security interest (such as one arising from a deed of trust) in the creditor's favor on real estate holdings, which may include oil and gas interests, land, commercial or residential buildings, and similar real estate assets to the extent they are not encumbered. The same amendments should allow a judgment debtor to provide a U.C.C. security interest in the creditor's favor on personal property, which may include livestock, crops, inventories, equipment, oil and gas production held in storage or in transit,<sup>142</sup> and registered or

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to presume an execution that was valid at the time it was made, followed by a change in circumstances that would make it unjust for the executing party to retain the value of the property seized."); Cruz v. Ghani, No. 05-17-00566-CV, 2018 WL 6566642, at \*23 (Tex. App.—Dallas Dec. 13, 2018, pet. denied) (mem. op.) (evaluating a judgment creditor's liability for the forced sale of the debtor's condominium for a mere \$25,000 when it had a market value of \$217,500).

141. Carlson, *supra* note 8, at 1094 (citing TEX. PROP. CODE ANN. § 52.001). An elaboration from Professor Carlson's idea, and from this paper's many security-interest observations and analyses, appears in Part VI *infra* in connection with a new Section 52.006(b)(2)(a)-(d) for the Civil Practice and Remedies Code.

142. In the author's direct experience, secured parties can and do obtain U.C.C. security interests in oil and gas production that is stored in specific locations, such as crude oil in tankage at Midland, Texas, or that is being "shipped" (i.e., transported continuously via pipeline) to a certain

unregistered securities. Qualified appraisal professionals, such as a petroleum engineer for oil and gas interests, an oil and gas marketing consultant for severed production, a real estate appraiser for land, and a livestock appraiser for cattle, should establish the value of the property to be used as alternate security.

As with interest earned on a cash deposit, any earnings to the alternate-security property pending the appeal would accrue to the judgment debtor. Also, the judgment debtor would have the right to continue using the property in the course of its regular business.<sup>143</sup>

C. *Proposed Reform No. 3: Redetermining Judgment Security During the Appeal to Avoid Superseding an Ersatz Judgment*

During the months or years-long journey to the Texas Supreme Court or United States Supreme Court following an appellate victory that has reduced the judgment liability, the judgment debtor must continue to supersede the security amount demanded by the original judgment<sup>144</sup>—despite the judgment’s suspect nature. In order to lessen or avoid the costs of maintaining a supersedeas bond, or other supersedeas-related transactional costs, stemming from the original judgment, Texas law should enable judgment debtors to lower their supersedeas burdens during the appeal to the Texas or federal high courts when a decision by an intermediate appellate court has reduced the judgment liability.

Amendments to the statute and procedural rule to allow for such reduction may allow (or may forbid) the converse: the increasing of the security amount during an appeal and before its conclusion in light of an appellate decision that *increases* a defendant’s monetary liability. However, even if the amendments provide for a “two-way street,” on balance they will favor judgment debtors more than creditors. Most commonly, Texas appellate courts reduce monetary liability for defendants; seldom do they

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location, such as the same oil traveling to Midland via the Permian Basin Gathering system operated by Plains All American Pipeline, L.P.

143. *Cf.* CIV. PRAC. & REM. § 52.006(e); TEX. R. APP. P. 24.2(d) (both providing that “the trial court may not make any order that interferes with the judgment debtor’s use, transfer, conveyance, or dissipation of assets in the normal course of business”).

144. *See* Carlson, *supra* note 8, at 1105 (citing Tex. R. App. P. 24.1 and concluding: “there is no authority that empowers the trial court to order an increase or decrease in appellate security premised upon an appellate court judgment when that judgment is subject to further appellate review, and no mandate has issued”); *see id.* at 1106 (“[T]he trial court judgment should remain the operative judgment until the appellate process is complete and a judgment is entered by the appellate court and the appellate court issues its mandate requiring recognition and enforcement of its judgment.”).

increase such liability.<sup>145</sup> Further, even when an appellate decision increases monetary liability on appeal, other supersedeas-related amendments proposed by this paper will protect judgment debtors that must provide more judgment security—especially the amendment to allow a judgment liability (including a re-determined liability under a continuing appeal) to lessen a judgment debtor's overall net worth.

D. *Proposed Reform No. 4: The Subordination or Removal of Judgment-Related Liens and Freeing Up Assets Necessary for Supersedeas*

Seemingly Texas law would allow a judgment debtor to subordinate or remove the judgment-related liens, as necessary, when it needed to use real estate for purposes of raising a cash deposit or obtaining a bond. Many times following the 2003 supersedeas reforms, Texas courts have acknowledged the absolute nature of a judgment debtor's right to supersede a judgment pending appeal.<sup>146</sup> The Texas Supreme Court has observed several times that a judgment debtor's right to supersede a judgment takes precedence over a judgment creditor's right to collect on a judgment or to protect its security interests.<sup>147</sup> Existing Texas case law and statutory law certainly empower a trial court to subordinate or remove judgment-related liens in a variety of contexts.<sup>148</sup> Although one dated Texas case holds that judgment-collection efforts, when begun before supersedeas efforts, can

145. See, e.g., *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687, 697 (Tex. App.—Eastland 2018, no pet.) (reviewing a judgment well in excess of \$50 million and reversing the great majority of damages claims against the defendants); *Hardwick v. Smith Energy Co.*, 500 S.W.3d 474, 479, 486–88 (Tex. App.—Amarillo 2016, pet. granted, judgment vacated w.r.m.) (relieving a defendant from a judgment of over \$8.5 million, reducing the judgment to \$79,428).

146. See, e.g., *Miga v. Jensen*, 299 S.W.3d 98, 100 (Tex. 2009) (“A judgment debtor is entitled to supersede the judgment while pursuing an appeal . . .”).

147. See, e.g., *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 170 (Tex. 2013) (orig. proceeding) (“House Bill 4 ‘reflect[ed] a new balance between the judgment creditor’s right in the judgment and the dissipation of the judgment debtor’s assets during the appeal against the judgment debtor’s right to meaningful and easier access to appellate review.’”).

148. See *Alford v. Thornburg*, 113 S.W.3d 575, 588 (Tex. App.—Texarkana 2003, no pet.) (“We affirm the trial court’s order directing [Plaintiff] to release the abstract of judgment and the lis pendens.”); see also *Daves v. Lawyers Sur. Corp.*, 459 S.W.2d 655, 656 (Tex. Civ. App.—Amarillo 1970, writ ref’d n.r.e.) (“[T]he district court . . . entered judgment removing the abstract of judgment as a cloud on [defendant’s] property.”); PROP. § 52.0011(a)(1)–(2) (prescribing two rules for when a judgment lien does not encumber real property). Further, the Texas Property Code itself implicitly recognizes that “further action[s]” may be taken in any court with respect to an abstract of judgment or judgment lien. Cf. PROP. § 52.042 (“[A]ny abstract of judgment or judgment lien is canceled and released *without further action in any court* and may not be enforced [under certain circumstances].” (emphasis added)).

preclude the debtor's filing of a supersedeas bond, a prominent commentator on Texas law believes that case, from 1990, ceased being good law upon the 1997 reforms to supersedeas laws.<sup>149</sup>

So, what prevents a judgment debtor's use of its real estate holdings to supersede a judgment? Despite Texas law's tendency to favor such efforts, ultimately, a trial court—using its discretion—may disallow the debtor's use of real estate holdings for supersedeas purposes. Challenging a trial court's discretion by way of appeal or mandamus proceeding is fraught with expense, difficulty, and uncertainty.

For the sake of business litigants that must supersede a judgment by using real estate, Texas law should enable the litigants to subordinate or remove any and all judgment-related liens hindering the real estate's use in a sale for cash or as collateral for a bond. Judgment creditors receive adequate protection by way of a cash deposit or bond; indeed, the procedural rule expressly contemplates that a cash deposit or bond is sufficient protection for judgment creditors.<sup>150</sup> The statute and the procedural rule presently do not entitle judgment creditors to any greater protection than a cash deposit or bond. Judgment creditors, therefore, will suffer no diminution in rights if they can no longer use judgment-related liens to block judgment debtors' efforts to obtain a cash deposit or a bond. Only those litigants seeking an absurd result, or more likely seeking to apply on a defendant onerous pressure to settle a case, would oppose the subordination or removal of

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149. Noted commentator William Dorsaneo, who sits on the Texas Supreme Court's Rules Advisory Committee and played a role in its drafting of the current Rule of Appellate Procedure 24, believes that *Texas Employers' Ins. Ass'n v. Engelke*, 790 S.W.2d 93 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding), is no longer good case law. William Dorsaneo has written:

Prior to the 1997 amendments, one court of appeals [in *Engelke*] reasoned that once levy occurred . . . a later filed supersedeas bond “did not, and could not, have vacated the fixed rights of the judgment creditor to the proceeds seized pursuant to the levy.” The *Engelke* holding precedes the 1997 amendments to the Appellate Rules. Before the amendments, Appellate Rule 47(j) provided that a proper supersedeas bond was effective to suspend execution of the judgment “if execution has been issued” [see former TEX. R. APP. P. 47(j)] . . . . After the 1997 amendments, the Appellate Rules refer to the issuance of the writ of execution, but provide that “[e]nforcement begun before the judgment is superseded must cease when the judgment is superseded” [TEX. R. APP. P. 24.1(f)]. Thus, this aspect of *Engelke* is probably not applicable after the 1997 amendments.

10 William V. Dorsaneo III et al., TEXAS LITIGATION GUIDE § 148.05[2] (2016).

150. See TEX. R. APP. P. 24.1(a)(2)–(3) (stating the methods by which a judgment debtor may supersede the judgment against him).



judgment-related liens so as to hinder the real estate's use in a sale for cash or as collateral for a bond.

IV. PROPOSED AMENDMENTS TO SECTION 52.006,  
WITH SUMMARY EXPLANATION

With the foregoing reform arguments so presented, here in **underlined bold** are the proposed amendments to the statute. (Working with the Rules Advisory Committee, the Texas Supreme Court would need to amend Rule of Appellate Procedure 24 to ensure its consistency with the statute so amended.) Explanations, when and as necessary, appear in *italics* with brackets.

Sec. 52.006. AMOUNT OF SECURITY FOR MONEY JUDGMENT.

(a) Subject to subsection **(c)**, when a judgment is for money, the amount of security must equal the sum of:

- (1) the amount of compensatory damages awarded in the judgment **before the appeal or, pursuant to subsection (e)(2), as revised by appellate action before mandate;**
- (2) interest for the estimated duration of the appeal; and
- (3) costs awarded in the judgment **before the appeal or, pursuant to subsection (e)(2), as revised by appellate action before mandate.**

*["Subjection (b)" has changed to "(c)" in light of the new subsection (b)(1)-(2) below. Also, the phrase "before the appeal or, pursuant to subsection (e)(2), as revised by appellate action before mandate" becomes necessary because subsection (e)(2) below provides the judgment debtor with an absolute right to security-amount redetermination during the appeal and before the appeal's conclusion, which typically is occasioned by a mandate under Rule of Appellate Procedure 18.]*

**(b)(1) The judgment debtor has a right to supersede a judgment by means of:**

- (a) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;**
- (b) filing with the trial court clerk a good and sufficient bond;**
- (c) making a deposit with the trial court clerk in lieu of a bond; or**
- (d) providing alternate security in favor of the judgment creditor.**

**(b)(2)(a) Alternate security may consist of a mortgage, deed of trust, lien, or other instrument creating security interests in the judgment creditor's favor under Chapters 51 or 64 of the Property Code, or under other applicable law, on the judgment debtor's real estate holdings to the extent those assets are unencumbered, including land, commercial or residential buildings, rents from real property, oil and gas working interests, oil and gas royalty interests, mineral-ownership rights, and other real estate assets, following a valuation appraisal of the same by a qualified professional.**

**(b)(2)(b) Alternate security may consist of a security interest in the judgment creditor's favor under Chapters 1 or 9 of the Business and Commerce Code, or under other applicable law, on the judgment debtor's personal property to the extent those assets are unencumbered, including livestock, crops, inventories, accounts, instruments, fixtures, equipment, oil and gas production held in storage or in transit, registered or unregistered securities, jewelry, and other personalty, following a valuation appraisal of the same by a qualified professional.**

**(b)(2)(c) During the appeal, the judgment debtor will continue to manage and use the real estate holdings and personalty that is being used as alternate security. The judgment debtor will receive any earnings from the real estate holdings and personalty that is being used as alternate security.**

**(b)(2)(d) The judgment debtor has a right to elect to use as many or as few security interests as it chooses, in whichever form it chooses, in order to supersede a judgment by using alternate security.**

*[Rule of Appellate Procedure 24.1(a) contains the four means by which the judgment debtor can supersede a judgment: agreement, bond, cash deposit, and alternate security. This amendment lists the first three means verbatim from the procedural rule, but revises the listing of alternate security and defines it so as to provide the judgment debtor with an absolute right to alternate security – not dependent on a trial court's discretion. The smaller business defendant in Texas likely will have substantial real estate holdings or personal property with which it can supersede a judgment by means of a deed of trust, lien, or other security interest in the judgment creditor's favor; and, such "alternate security" is often preferable to either a bond or cash deposit. The business defendant can continue to*

*operate, and receive earnings from, the realty and personalty during the appeal. As owner of the real and personal property, the business litigant ought to have the right to choose the numerosity and the kinds of security interests that it will use in order to supersede a judgment, without interference from a judgment creditor, another litigant, or the trial court utilizing its discretion over the matter.]*

**(c)(1)** Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:

**(a)** 50 percent of the judgment debtor's net worth; or

**(b)** \$25 million.

**(c)(2) When a judgment is for money, the judgment amount must be deemed an accounting liability for purposes of determining the judgment debtor's net worth under the formula of net worth equals total assets less total liabilities, even if the judgment debtor's net worth becomes zero or a negative value.**

*[This is a renumbering and renaming to "(c)" to make room for the new subsection (b). Also, abiding by GAAP accounting, subsection (c)(2) provides that a civil judgment liability constitutes an actual liability for purposes of calculating net worth, even when the net-worth formula produces zero or a negative number by including the judgment as a liability.]*

**(d)** On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm if required to post security in an amount required under subsection (a) or **(c)**, the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.

*[This renaming to "(d)" makes room for the new subsection (b).]*

**(e)(1)** An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section.

**(e)(2) When a judgment is for money, following any intermediate court's decision or action that lowers the judgment amount that the trial court used to set security, the judgment debtor has a right when**

**further review is sought in the Texas Supreme Court or the United States Supreme Court to a redetermination of the amount of security required to supersede the judgment under this section or under Rule 24, regardless of whether the appellate court issues a mandate and whether the appellate proceedings are completed.**

*[This is a renumbering and renaming to “(e)” to make room for the new subsection (b). Presently, a judgment debtor must supersede a judgment as it existed before any appellate court’s decision or action reducing the judgment – until the appellate court issues a mandate to the trial court under Rule of Appellate Procedure 18 or the entire appeal has concluded. Subsection (e)(2) enables a judgment debtor to seek a redetermination of the security amount in light of a reduction on appeal – which may be continuing – without having to wait months or years for the mandate or appellate conclusion.]*

**(f)** Nothing in this section prevents a trial court from enjoining the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor’s use, transfer, conveyance, or dissipation of assets in the normal course of business.

*[This is a renaming to “(f)” to make room for the new subsection (b).]*

**(g) When a judgment is for money, the judgment debtor has a right to the subordination of, or the removal of, any judgment liens filed under Property Code chapter 52 or other applicable law, in the event the judgment debtor seeks to use real estate holdings to supersede the judgment, whether in a sales transaction to raise a cash deposit, as collateral for a bond, or otherwise.**

*[Subsection (g) gives a judgment debtor seeking to supersede a judgment an absolute right to use real estate holdings in a sale to raise cash proceeds, or as collateral for a supersedeas bond, despite pending judgment liens, such as abstracts of judgment. The judgment debtor would not have to ask a trial court to use its discretion to lift, subordinate, or release the liens.]*

Below are the proposed amendments without highlighting or explanations.

Sec. 52.006. AMOUNT OF SECURITY FOR MONEY JUDGMENT. (a) Subject to subsection (c), when a judgment is for money, the amount of security must equal the sum of:

- (1) the amount of compensatory damages awarded in the judgment before the appeal or, pursuant to subsection (e)(2), as revised by appellate action before mandate;
- (2) interest for the estimated duration of the appeal; and
- (3) costs awarded in the judgment before the appeal or, pursuant to subsection (e)(2), as revised by appellate action before mandate.

(b)(1) The judgment debtor has a right to supersede a judgment by means of:

- (a) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;
- (b) filing with the trial court clerk a good and sufficient bond;
- (c) making a deposit with the trial court clerk in lieu of a bond; or
- (d) providing alternate security in favor of the judgment creditor.

(b)(2)(a) Alternate security may consist of a mortgage, deed of trust, lien, or other instrument creating security interests in the judgment creditor's favor under Chapters 51 or 64 of the Property Code, or under other applicable law, on the judgment debtor's real estate holdings to the extent those assets are unencumbered, including land, commercial or residential buildings, rents from real property, oil and gas working interests, oil and gas royalty interests, mineral-ownership rights, and other real estate assets, following a valuation appraisal of the same by a qualified professional.

(b)(2)(b) Alternate security may consist of a security interest in the judgment creditor's favor under Chapters 1 or 9 of the Business and Commerce Code, or under other applicable law, on the judgment debtor's personal property to the extent those assets are unencumbered, including livestock, crops, inventories, accounts, instruments, fixtures, equipment, oil and gas production held in storage or in transit, registered or unregistered securities, jewelry, and other personalty, following a valuation appraisal of the same by a qualified professional.

(b)(2)(c) During the appeal, the judgment debtor will continue to manage and use the real estate holdings and personalty that is being used as alternate

security. The judgment debtor will receive any earnings from the real estate holdings and personalty that is being used as alternate security.

(b)(2)(d) The judgment debtor has a right to elect to use as many or as few security interests as it chooses, in whichever form it chooses, in order to supersede a judgment by using alternate security.

(c)(1) Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:

- (a) 50 percent of the judgment debtor's net worth; or
- (b) \$25 million.

(c)(2) When a judgment is for money, the judgment amount must be deemed an accounting liability for purposes of determining the judgment debtor's net worth under the formula of net worth equals total assets less total liabilities, even if the judgment debtor's net worth becomes zero or a negative value.

(d) On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm if required to post security in an amount required under subsection (a) or (c), the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.

(e)(1) An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section.

(e)(2) When a judgment is for money, following any intermediate appellate court's decision or action that lowers the judgment amount that the trial court used to set security, the judgment debtor has a right when further review is sought in the Texas Supreme Court or the United States Supreme Court to a redetermination of the amount of security required to supersede the judgment under this section or under Rule 24, regardless of whether the appellate court issues a mandate and whether the appellate proceedings are completed.

(f) Nothing in this section prevents a trial court from enjoining the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

(g) When a judgment is for money, the judgment debtor has a right to the subordination of, or the removal of, any judgment liens filed under Chapter 52, Property Code or other applicable law, in the event the judgment debtor seeks to use real estate holdings to supersede the judgment, whether in a sales transaction to raise a cash deposit, as collateral for a bond, or otherwise.

#### V. A RETROSPECTIVE, AND CONCLUSIONS FOR IMPROVING TEXAS SUPERSEDEAS LAWS

In 1985, in a meager Harris County courtroom, the Pennzoil Company, an oil company based in Texas, obtained a \$10.53 billion verdict against Texaco, Inc., despite its name, an oil company based in New York.<sup>151</sup> The trial court promptly rendered a \$10.53 billion judgment, which imposed on judgment debtor Texaco a staggering \$3 million in post-judgment interest *per day*.<sup>152</sup>

That Texaco had tortiously interfered with Pennzoil's "contract" to buy equitable securities from J. Paul Getty entities<sup>153</sup>—and that Texaco

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151. *In re Longview Energy Co.*, 464 S.W.3d 353, 358 (Tex. 2015) (orig. proceeding); COLL, *supra* note 2, at 470.

152. *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1138 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987); COLL, *supra* note 2, at 473.

153. See COLL, *supra* note 2, at 473 (describing Getty Oil's investment banker's view on the "contract" with Pennzoil: "all of the Wall Street experts involved in the deal, including those representing Pennzoil, knew—or should have known—that an 'agreement in principle' was nothing more than an agreement to agree, and that in practical terms it represented an invitation to outsiders to bid for the company [Getty Oil]"); Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1030 (1992) (describing *Texaco v. Pennzoil's* scenario that "Texaco was accused of having tortiously interfered with a contract that allegedly existed between the Getty Foundation and Pennzoil" as an example of "the more neglected problem of the overenforcement of promises"); Timothy S. Feltham, Note, *Tortious Interference with Contractual Relations: The Texaco Inc. v. Pennzoil Co. Litigation*, 33 N.Y.L. SCH. L. REV. 111, 143–44 (1988) (criticizing *Texaco v. Pennzoil's* result because the Houston Court of Appeals improperly gave full protection not to a binding contract, but to an agreement in principle); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1117 (1993) ("The *Texaco v. Pennzoil* court did not take into account the tentative nature of the relationship between Pennzoil and Getty, but instead protected it as if it were a binding, unalterable contract.").

consequently owed billions in damages to Pennzoil<sup>154</sup>—were monumental legal questions worthy of the most exacting appellate scrutiny. The years following trial did not see that exacting appellate scrutiny. In 1987, the Houston Court of Appeals mostly affirmed the judgment,<sup>155</sup> the Texas Supreme Court oddly refused to review the case, and, despite their concerns for Texaco and for rational process, the federal courts could not relieve Texaco as judgment debtor of the judgment's effects—such as by enjoining Pennzoil's judgment-execution efforts.<sup>156</sup> By 1988, Texaco had filed for bankruptcy protection. The case settled shortly thereafter.<sup>157</sup> Texaco paid Pennzoil \$3 billion in order to emerge from bankruptcy.<sup>158</sup>

Historically speaking, *Texaco v. Pennzoil* remains our civil justice system's greatest folly and embarrassment. From the case's suspect trial proceedings

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154. Awarding Pennzoil \$7.5 billion in compensatory damages because it lost the opportunity to buy—that is, *painfully buy* via billions in cash reserves and financing—an interest in Getty Oil for roughly \$9 billion made no sense. This damages model necessarily, and patently, went far beyond making Pennzoil whole on the transaction, and it defied substantive-law standards. *See generally* Robert M. Lloyd, *Pennzoil v. Texaco, Twenty Years After: Lessons for Business Lawyers*, 6 *TRANSACTIONS: TENN. J. BUS. L.* 321, 346 (2005) (“While Pennzoil’s [damages] theory was simple and seemingly logical, it was totally bogus. If Getty Oil was really that valuable, why was Texaco able to get it by paying only 10% more than Pennzoil was offering? Were all the large oil companies in the world (or for that matter all the large companies and rich individuals who had the wherewithal to put together a big deal) so stupid that they didn’t know how valuable Getty was? Were they really so stupid they couldn’t read the reports and do the math that the jury was being asked to do? The answer, of course, is that things weren’t as simple as Pennzoil’s argument made out.”); KEVIN J. DELANEY, *STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE* 133 (1992) (describing Pennzoil’s damage theory as “a strange way to calculate the damages”).

155. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 866 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.) (eliminating \$2 billion in punitive damages and thereby affirming a judgment of \$8.53 billion).

156. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 (1987) (disallowing an injunction against Pennzoil’s judgment-collection efforts, which the Second Circuit had upheld, by concluding “the lower courts should have deferred on principles of comity to the pending [Texas] state proceedings”).

157. *See Texaco, Inc. v. Pennzoil Co.*, 748 S.W.2d 631, 631–32 (Tex. App.—Houston [1st Dist.] 1988) (per curiam) (noting “[t]he Texas Supreme Court refused, n.r.e., appellant Texaco’s application for writ of error on November 2, 1987. On April 12, 1987, Texaco filed a voluntary petition for relief under chapter 11 of the federal bankruptcy laws. . . . [T]he parties state that the judgment of the 151st District Court, which was affirmed in part and reversed in part by this Court, has been fully and finally settled, which settlement was approved by the bankruptcy court . . .”).

158. Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 *VA. L. REV.* 295, 298 (1989).



and backdrop,<sup>159</sup> its suspect appellate review<sup>160</sup> and appellate politics,<sup>161</sup> and its legendary supersedeas struggles<sup>162</sup> arose the academic work

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159. COLL, *supra* note 2, at 413–14, 434–35, 441–42, 449 (surveying examples of regional and cultural prejudices against Texaco's witnesses, as shown by Pennzoil's trial lawyers and the trial court itself); Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 676 n.32 (2001) (discussing events before the initial trial judge's departure for health reasons in that "[t]wo days after Judge Anthony Farris was assigned to hear the case of *Texaco v. Pennzoil*, Joe Jamail, Pennzoil's lead counsel at the time, donated \$10,000 to Judge Farris' re-election campaign and another \$10,000 to the campaign of the administrative judge with supervisory powers over Judge Farris. . . . Texaco's motion to recuse Judge Farris on the basis of the contribution was denied") (citations omitted); J. Caleb Rackley, *A Survey of Sea-Change on The Supreme Court of Texas and Its Turbulent Toll on Texas Tort Law*, 48 S. TEX. L. REV. 733, 778 (2007) ("To make matters more suspect, when Farris had to step down from the case over half-way through for health reasons, Solomon Casseb Jr. was chosen to replace him. Casseb was 'a boyhood friend of Jamail's,' and his 'charge to the jury, in which the word 'agreement' was used instead of 'contract' was a key point in Texaco's eventual appeal." (quoting Janet Elliott, *Pennzoil Versus Texaco: Ten Years Later, Lasting Impact or Legal Anomaly? A Look Back at the Real Trial of the Century*, TEX. LAW., Dec. 18, 1995, at 1, 18–19)).

160. The Houston Court of Appeals' opinion on the trial proceedings is thorough, approaching 100 pages in length. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ re'fd n.r.e.). But the opinion is inadequate because it relies on a press release, Wall Street Journal articles, and business discussions in an exceedingly short time period—from just January 3 to 6, 1984—to conclude that Pennzoil had a binding contract with J. Paul Getty entities to buy an interest in Getty Oil. *Texaco, Inc.*, 729 S.W.2d at 784–86, 799–802. Consequently, many commentators have observed that, at best, Pennzoil had only an agreement to keep negotiating towards a contract—and not a binding contract. See *supra* note 153. Moreover, the opinion heavily discounts that many Getty entities were actively seeking other proposals and, thus, were showing their inclination to reject Pennzoil's proposal regardless of Texaco's conduct. *Texaco, Inc.*, 729 S.W.2d at 786, 799. These facts condemn the notion that Texaco's conduct caused Pennzoil to breach the alleged contract. See generally Int'l Bureau for Prot. & Investigation, Ltd. v. Pub. Serv. Emps. Union, 413 N.Y.S.2d 962, 969 (N.Y. Sup. Ct. 1979) (listing, under New York law (the law underlying the *Texaco v. Pennzoil* case), "defendant's intentional procurement of the breach of [] contract" as an element of tortious interference under that law) (emphasis added). The opinion disregards Texaco's direct evidence that it lacked knowledge of any contract between Pennzoil and the Getty entities. *Texaco, Inc.*, 729 S.W.2d at 798, 800. The opinion allows an outlandish damages model that flaunts common sense. *Id.* at 831, 835; see generally *supra* note 154.

In sum, no Texas practitioner with experience in legal-sufficiency review—as it exists in Texas today—could argue with conviction that the judgment in *Texaco v. Pennzoil* would survive scrutiny in any existing Texas appellate court.

161. See J. David Rowe, *Limited Term Merit Appointments: A Proposal to Reform Judicial Selection*, 2 TEX. WESLEYAN L. REV. 335, 345 (1995) ("The resulting corruption fostered by judicial campaign contributions is obvious. In the now infamous *Pennzoil v. Texaco* case, for example: 'Texaco representatives contributed campaign funds totaling \$72,700 to seven justices [of the Texas Supreme Court] while an appeal in the \$11 billion Pennzoil lawsuit against Texaco was pending before the court. Pennzoil lawyers countered, contributing \$315,000 to their campaigns. Further, four justices who received contributions from the parties did not even face re-election.'" (quoting Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection in Florida*, 43 FLA. L. REV. 529, 555(1991))).

product,<sup>163</sup> the legislative action,<sup>164</sup> and the heightened appellate scrutiny that presently shape trial-court and appellate proceedings in Texas. By way of many reforms, Texas's civil justice system has improved markedly since—and directly as a result of—*Texaco v. Pennzoil*. Among the reforms were the 1988 legislative amendments to procedural supersedeas laws, and the 2003 refinements thereof.

The 2003 refinements, which culminated in the statute and the procedural rule, have protected businesses and businesspeople from the nightmarish scenario faced by Texaco. But the statute and the procedural rule are inadequate still. They do not protect those businesses and businesspeople that need to appeal a judgment—but that cannot post as security the

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162. A good description of Texaco's supersedeas predicament appears in the Second Circuit's opinion upholding a federal court's injunction against Pennzoil's judgment-collection efforts. The description calls to mind this paper's explanation (in Part II.A *supra*) of a judgment debtor's inability to obtain a supersedeas bond (or cash deposit in lieu of bond) when facing a judgment well in excess of the debtor's unencumbered assets. See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1138 (2d Cir. 1986) ("Texaco would, absent injunctive relief, again face a financial crisis of staggering proportions, which could not under Texas law be avoided without Pennzoil's consent. . . . Texaco, in order to stay execution of the judgment against it pending its appeal, [must under Texas law] post a supersedeas bond, payable to Pennzoil, 'in at least the amount of judgment, interest and costs,' to the text of the note or more than \$12 billion since interest accumulates at the rate of approximately \$3 million per day. . . . Needless to say, Texaco could not possibly meet the mandatory bond requirement. It is estimated that the world-wide surety bond capacity ranges from \$1 billion to \$1.5 billion under the best possible circumstances. In addition, full collateralization would be required for a bond of such huge proportions. Texaco does not have sufficient liquid or immediately-liquidatable assets to post \$12 billion in cash or cash equivalents and still retain sufficient liquid assets to operate its business."), *rev'd*, 481 U.S. 1 (1987).

163. See Carlson, *supra* note 3, at 59–61 (arguing the requirement of a supersedeas bond violates the open courts provision in the Texas Constitution because taking a party's property before it can appeal denies meaningful court access); John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 59, 66–78 (1988) (surveying many broad initiatives to improve Texas's civil justice system); Douglas Laycock, *International Litigation Symposium Honoring the Distinguished Career of Professor Russell J. Weintraub: Introduction*, 38 TEX. INT'L L.J. 1, 3 (2003) (noting comments by Russell Weintraub, a distinguished professor at the University of Texas Law School: "If you shopped for law in Bedlam, you would expect to find a 'tort' of interference with contract that could be committed by making a better offer [namely, Texaco's conduct].") (quoting Russell J. Weintraub, *The Ten Billion Dollar Jury's Standards for Determining Intention to Contract: Pennzoil v. Texaco*, 9 REV. LITIG. 371, 373 n.6 (1990)).

164. *In re Longview Energy Co.*, 464 S.W.3d 353, 358 (Tex. 2015) (orig. proceeding) ("In the wake of *Texaco v. Pennzoil*, the Legislature re-entered the realm of supersedeas, enacting Chapter 52 of the Civil Practice and Remedies Code." (citing Act of June 16, 1989, 71st Leg., R.S., ch. 1178, § 1, 1989 Tex. Gen. Laws 4813, 4813–14, *repealed in part* by Act of June 2, 2003, 78th Leg., R.S. ch. 204, § 7.03, 2003 Tex. Gen. Laws 847, 863 (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 52.001, 52.005–.006))); see Carlson, *supra* note 8, at 1037–38, 1069 (commenting on the 1988 amendments to supersedeas laws resulting from *Texaco v. Pennzoil*).

judgment amount, one-half of net worth, or \$25 million. Clearly, the 2003 reforms would have helped Texaco, a publicly-traded company that eagerly would have deposited \$25 million in order to stave off Pennzoil's judgment-collection efforts. Moreover, the 2003 reforms have helped many large business litigants similar to Texaco by means of the \$25 million supersedeas cap. The 2003 reforms, however, have failed to help the smaller businessmen in *Hardwick*, *Ghani*, and *Stephens* because these judgment debtors could not readily post the judgment amount, one-half of net worth, or \$25 million. Contrasting their numbers against each other, as between the smaller and the larger business litigant, Texas sees many more business litigants having the size of those in *Hardwick*, *Ghani*, and *Stephens* than those having the size of Texaco. Therefore, the statute and the procedural rule potentially fail the majority of business litigants needing to appeal a judgment.

As did Texaco, must these smaller business litigants suffer bankruptcies and financial ruin in order to inspire supersedeas reform? (They should not have to.) Are they sufficiently high-profile to catch the Texas Legislature's attention in a future session? (They should be.)

The business litigants in *Hardwick*, *Ghani*, and *Stephens* are typically Texan—and the oilmen in *Hardwick* and *Stephens* are quintessentially so. These litigants have much more in the way of non-liquid assets (e.g., land, buildings, oil and gas interests, and ownerships in closely held companies) than they have of liquid assets (e.g., cash, stocks, and bonds). The litigants in *Hardwick* and *Stephens* are especially “land rich, cash poor,” owning primarily farmland and oil and gas interests. As a general rule, such business litigants cannot convert their assets to cash by way of prompt sales or exchanges, and they cannot obtain sufficient bank support to induce a surety to post a supersedeas bond. Without the ability to post a cash deposit or supersedeas bond, they must request some form of alternate security from the trial court—which has broad discretion to turn down their requests. Once turned down by the trial court, their challenges to trial-court discretion on appeal are fraught with expense and uncertainty.

Texas law can and should do better for the majority of business litigants that might face a daunting money judgment while needing to pursue an appeal. And, Texas law can protect their interests while still protecting judgment creditors, especially by allowing for “alternate security” as a matter of right.

First, this paper's most substantial argument has advanced that Texas law must recognize judgment liabilities as balance-sheet liabilities, just as

accounting professionals adhering to GAAP would do. Whether labeled as a “contingent” liability or a “certain” liability, a judgment liability on the cusp of enforcement has the hallmarks of an accounting “liability”; the judgment is “a present duty or responsibility” for the judgment debtor, leaving “little to no discretion” to avoid payment or other satisfaction, on transactions (i.e., the litigation events) that have “already happened.”<sup>165</sup> Allowing a trial or appellate court to keep the liability off the balance sheet because it is too remote or contingent, while allowing the judgment to wreck a judgment debtor’s financial wherewithal leads to an absurd and tragic scenario. If Texas ceases to use GAAP as the standard for determining a judgment debtor’s net worth, then the legislature or courts may use special definitions for “net worth” and may pick and choose the assets and liabilities for making the determination. Until such time, however, Texas should include a judgment liability on a judgment debtor’s balance sheet, thereby reducing (or even eliminating) net worth for purposes of the statute (i.e., 52.006(b)(1)) and the procedural rule (i.e., 24.1(a)(1)(A)). Doing so will align Texas law with GAAP and will significantly aid judgment debtors like those in *Hardwick*, *Ghani*, and *Stephens*. Doing so will encourage plaintiffs, which might become judgment creditors needing judgment security, to think carefully and efficiently about how many claims or damages theories they pursue in the trial court. Under this paper’s first reform, loading up a defendant (judgment debtor) with excessive damages liability in the trial court will negatively impact a judgment creditor’s ability to obtain judgment security—and that is a good and welcome thing.

Second, Texas law must grant a judgment debtor the right to post “alternate security,” rather than leaving the matter to the trial court’s discretion. Alternate security greatly benefits both judgment debtors and creditors and, for cases like *Hardwick*, *Ghani*, and *Stephens*, is superior to supersedeas bonds or cash deposits in lieu of bonds. Granting a right to alternate security will avoid the sizeable transactional costs that judgment debtors must incur when they seek to obtain a bond (namely, the bank’s and surety’s fees and premiums) and when they seek to raise a cash deposit (namely, the consequences of hastily selling land or closely held assets). The debtors preserve resources for the appeal, for regular business, and for ultimate collection by the creditor if the creditor prevails on appeal.

Third, Texas law must enable judgment debtors to lower their supersedeas burdens during an appeal to the Texas or United States

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165. FINANCIAL ACCOUNTING STANDARDS BOARD, *supra* note 101, para. 36. at CON6-13.

Supreme Courts when a decision by an intermediate appellate court has reduced the judgment liability. Even if this reform becomes a “two-way street,” so that judgment creditors may increase the supersedeas burdens in the contrary scenario, the reform on average will benefit debtors more than creditors, and this paper’s other reforms would still sufficiently protect the judgment debtors.

Fourth, Texas law must enable judgment debtors to subordinate or remove any and all judgment-related liens hindering their real estate’s use in a sale for cash or as collateral for a bond. The statute and the procedural rule presently do not entitle judgment creditors to any greater protection than a cash deposit or bond; therefore, this particular reform merely enables judgment debtors to supply judgment creditors with their greatest security rights. Judgment creditors, therefore, suffer no diminution in rights under this reform.

Texans do not easily give up their fighting against perceived injustice; when in litigation, this principle plays out perforce. When a Texas business litigant has become a judgment debtor after a lengthy, expensive, and hard-fought trial court proceeding, the litigant likely will appeal the judgment and, accordingly, will need to supersede the judgment. Facing supersedeas difficulties, most Texas business litigants will not settle a case, but rather will fight a war on two fronts: appealing the case for a review of the merits, while staving off judgment-collection efforts. The current supersedeas laws—by leaving limited rights to smaller, hard-fighting judgment debtors—engender wasteful satellite litigation and strife, benefit no one (other than plaintiff’s attorneys seeking to coerce a settlement), and leave judgment debtors subject to “shakedowns” in Texas courtrooms, as Texaco notoriously experienced in the late-1980s. The four reforms discussed in this paper—individually and collectively—seek to alleviate the foregoing state of affairs. May Texas legislators and courts take heed.