13th ANNUAL COVERAGE AND BAD FAITH

POST-VERDICT SOLUTIONS

Unchartered Waters: Navigating the Pitfalls of Texas Civil Practice and Remedies Code section 52.006 and Texas Rule of Appellate Procedure 24.2

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I. INTRODUCTION

The enactment of House Bill 4 resulted in the addition of section 52.006 to the Texas Civil Practice and Remedies Code and the corresponding amendments to the Texas Rules of Appellate Procedure which allow for the posting of alternative security to supersede the judgment and delay collection efforts pending appeal when the judgment is for money. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2. Before the amendments, judgment debtors were required to post bond for the entire judgment. Thus, appellate attorneys are venturing into unchartered waters by aiding judgment debtors to supersede the judgment with alternate security in an amount not exceeding fifty percent of the judgment debtor's net worth or $25 million where judgment debtors have the opportunity to post less collateral and pursue appeal but where they may be opening up their personal finances to examination by the judgment creditor and courts. Insurers are also treading into unchartered waters with the new supersedeas requirements and facing difficult questions such as whether they have a right to intervene and whether there is coverage for the supersedeas bond.

II. THE RULE

A. Texas Civil Practice & Remedies Code Section 52.006

Texas Civil Practice and Remedies Code section 52.006 provides as follows:

> **(a)** Subject to Subsection (b), 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;
>
> (2) interest for the estimated duration of the appeal; and
>
> (3) costs awarded in the judgment.
>
> **(b)** Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:
>
> (1) 50 percent of the judgment debtor's net worth
>
> (2) $25 million.
>
> **(c)** On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm is required to post security in an amount required under Section (a) or (b), the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.
>
> **(d)** An appellate court may review the amount of security as allowed under Rule 24, Texas Rule 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)** 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. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon 2005).

B. Texas Rule of Appellate Procedure 24

Texas Rule of Appellate Procedure 24.2 provides:

> **Amount of Bond, Deposit or Security**
>
> **(a) Type of judgment**
> **(1) For recovery of money.** When the judgment is for money, the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:
> (A) 50 percent of the judgment debtor's current net worth; or
> (B) 25 million dollars.
>
> **(b) Lesser amount.** The trial court must lower the amount of security required by (a) 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 (a) is likely to cause the judgment debtor substantial harm.

> **(c) Determination of net worth**
>
> **(1) Judgment debtor's affidavit required; contents; prima facie evidence.** A judgment debtor who provides a bond, deposit, or security under (a)(1)(A) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.
>
> **(2) Contest; discovery.** A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.
>
> **(3) Hearing; burden of proof; findings.** The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.
>
> **(d) Injunction.** 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.

TEX. R. APP. P. 24.2.

III. LEGISLATIVE HISTORY

A. Texas Legislature's Interpretation

1. Determining Legislative Intent

Statutory interpretation presents a question of law subject to *de novo* review. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex.1997). The Texas Legislature has provided the Code Construction Act ("the Act") to guide interpretation of Texas statutes. *See* TEX. GOV'T CODE ANN. § 311.001 et seq. (Vernon 1998). Statutes must be construed as written, and legislative intent must be ascertained from the statute's language when possible. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Courts apply a statute's plain language because they presume that the legislature said what it meant, and its words are the surest guide to its intent. *Fitzgerald v. Advanced Spine Fixation SYS., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999). Therefore, the plain language applies unless it would lead to an absurd result. *See Tune v. Tex. Dept. of Pub. Safety*, 23 S.W.3d 358, 363 (Tex. 2000).

However, even when a statute is not ambiguous on its face, other factors can be used to determine the legislature's intent, including (1) the object sought to be obtained; (2) circumstances of the statute's enactment; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; and (6) administrative construction of the statute; and title, preamble, and emergency provision. *Id.* (*citing* TEX. GOV'T CODE ANN. § 311.023). In determining legislative intent, courts must analyze the purpose of the legislation, the end to be attained, and the evil to be remedied. *Flowers v. Dempsey-Te-geler & Co., Inc.*, 472 S.W.2d 112 (Tex.1971); *Calvert v. Kadane*, 427 S.W.2d 605 (Tex.1968). The statute must be considered as a whole rather than in isolated provisions, and one provision should not be given a meaning inconsistent with other provisions. *Id.*

2. Legislative Hearings

The intent behind enacting the House Bill 4 amendments was to facilitate a judgment debtor's superseding a judgment to enable appeal of the judgment.

a. Object Sought to Be Obtained: Facilitation of Judgment Debtor's Appeal

> APPEAL BONDS. Many defendants find it difficult to pursue appeals because they cannot afford the high costs of an appeal bond. In many cases, the cost of the bond makes the end of the suit at the time of judgment and not after a rightfully brought appeal. CSHB 4 would limit the bonding requirement to compensatory damages awarded and would cap the total amount of the bond. The proposed amount, the greater of 50 percent of the defendant's net worth or $25 million, has been found sufficient in other states and has not been considered so high as to encourage defendants to default on their bonds or to deny plaintiffs the relief to which they are entitled.

HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003).

b. Circumstances of the Enactment of section 52.006 subparts (a) and (b) of the Texas Civil Practice & Remedies Code

Representative Nixon, Chair of the Civil Practices Committee, explained that House Bill 4 was a comprehensive civil justice reform bill intended to address and correct serious problems with the court system. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199 (February 26, 2003). The bill was designed to promote fairness and efficiency in civil lawsuits, protect Texas citizens and courts from abusive litigation tactics, remove incentives causing unwarranted delay and expense, and restore the balance in the court system to operate more efficiently and fairly and less costly. *Id.* Nixon recognized that the 1995 amendments made great strides in correcting some of the worst problems in the court system. *Id.* at 200. However, the amendments were unable to reach all abuses in the system, one of which was the posting of alternative security to enable a judgment debtor to appeal a judgment rendered against it. *Id.* at 200. Representative Nixon provided as follows:

> Since 1995, Texas has consistently been among the states with the largest jury verdicts. In some years, Texas is responsible by itself for more than one-fifth of the largest verdicts in the United States. Since 1995, Texas–the verdicts in Texas courts above $10 million–now we are only talking about those, Members, that are above the $10 million–have totaled $10.5 billion. This figure represents just the tip of the iceberg because we all know that small cases are settled and never go to trial. We are only talking about $10 billion in verdicts over $10 million in the last ten years. Total payoffs by defendants in our court system through either judgment or settlement is in the billions of dollars and this does not include the cost that litigation environment poses on our economy by driving away business, stifling innovation, and increasing the costs of goods and services. These costs to litigants, the court system, and society as a whole, in my opinion, are too great. The civil justice system is out of balance. And I think that recent polling indicates the 73% of Texas believe it is time to take many of the corrective actions that we have addressed in this bill.

Id. One section of the bill addressed appeal bonds and limited the types of damages for which bonding was required to supersede judgment. *See id.* at 201. Nixon commented that due to the size of some judgments out of Texas courts that it was "near impossible" to get a bond and thus impossible to appeal the judgment without liquidating a company. *Id.*

c. Legislative History: Easier Access to Appellate Relief for Judgment Debtors

During the Senate Committee hearings, there was testimony supporting easier access for a judgment debtor to appeal a judgment against it. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1448-51 (April 15, 2003).

Kent Rowald, a Houston attorney, testified that oftentimes the damages awarded in a judgment were substantially more than the value of the companies involved. *Id.* at 1448. Rowald commented that there were frequently critical legal issues involved in these kinds of cases that needed to be considered on appeal. *Id.* However, with such a large judgment it was sometimes impossible to procure a bond and otherwise collection efforts could be pursued during the appeal. *Id.* He provided that as a practical matter, collection efforts during appeal could end a company's life, resulting in bankruptcy, before the appeal had even been considered. *Id.* Allowing a judgment debtor to instead post a percentage of its net worth to stay enforcement of the judgment would allow more judgment debtors to continue their business operations while they pursued appeal. *Id.* at 1448-49. In addition, such a provision would not prevent collection efforts but would merely delay such efforts until the appeal was considered. *Id.* at 1450.

Lee Parsley, an Austin appellate attorney and former Rules Attorney for the Texas Supreme Court, explained that under the previous statutory scheme, a judgment debtor had to post security for the entire judgment including damages, interest, and costs. *Id.* He noted that the bonding process was expensive because bond companies normally required one-hundred percent security; thus, the judgment debtor had to either face collection efforts by the judgment creditor or tie up a substantial amount of its assets to procure a bond. *Id.* Because the bonding company then had a lien on a substantial amount of the judgment debtor's assets, the judgment debtor was forced to constantly negotiate with the bond company to move, sell, or purchase assets. *Id.* In addition, due to the size of verdicts, the judgment debtor could possibly be foreclosed from seeking a bond. *Id.*

Parsley explained that allowing a judgment debtor to

instead post security in an amount of fifty percent of its net worth or $25 million helped not only large corporations but also mom and pop businesses. *Id.* He commented that smaller business many times had to pursue bankruptcy protection when they were unable to post security for the entire judgment. *Id.* Parsley cautioned that companies filing for bankruptcy had greater ramifications due to its effect on other creditors –putting them at risk for seeking bankruptcy relief, in turn putting that company's employees at risk for losing their jobs. *Id.* at 1451.

d. Legislative History: Defining "Net Worth"

The Legislature declined to define "net worth" in Chapter 52 of the Texas Civil Practice and Remedies Code.

(1) Hearings in the House

The House did not reach a determination regarding the definition of "net worth." In fact, the House instead recognized the difficulty it faced in defining "net worth" and decided to instead empower the trial court to decide "net worth" on a case-by-case basis providing as follows:

> There is no easy way to define 'net worth,' and it is important to give judges discretion to determine this on a case-by-case basis. If a plaintiff feels that a defendant is manipulating its assets to reduce the bond amount, the plaintiff can ask the judge to address this.

HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003).

(2) Senate Hearings

The Senate also failed to reach a consensus on the definition of net worth. During the Senate Committee hearings, Dan Byrne, representing Texans for Civil Justice, requested that the Senate define "net worth." Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1957-58 (May 7, 2003). In his request, Byrne also addressed the issue of insurance coverage and recommended that such coverage be considered an asset when determining a judgment debtor's net worth. *Id.* at 1458.

e. Legislative History: Facilitation of Judgment Debtor's Appeal by Enacting a Substantial Economic Harm Standard to Lower the Amount of Supersedeas

Section 52.006 provides courts flexibility to lower the amount of supersedeas based on a showing of substantial economic harm. HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 338 (March 25, 2003). If the debtor shows that it is likely to suffer substantial economic harm if required to post security in the required amount, the trial court has to lower the amount of security to an amount that will not cause the judgment debtor substantial economic harm. *Id.* at 365.

(1) Testimony in the House

Peter Kelly, an attorney from Houston, testified regarding the irreparable harm standard under the previous enactment for posting supersedeas bonds. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 322 (February 26, 2003). Kelly explained that the problem under the previous enactment was not the irreparable harm standard but how to go about proving irreparable harm. *Id.* Kelly did not believe that substitution of a substantial economic harm standard would solve the problem but would instead create new problems–requiring a separate trial on the issue of net worth and an extremely detailed economic finding to determine fifty percent of net worth. *Id.* at 323. Kelly instead recommended that the legislature retain the irreparable harm standard and set out the burden of proof for the judgment debtor to show irreparable harm. *Id.*

(2) Testimony in the Senate

In the Senate, Kelly complained that the term "substantial economic harm" was meaningless due to its broad definition. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1459 (April 15, 2003). Kelly contended that the appellate courts would be unable to overturn a trial court's decision on substantial economic harm because it was undefined while the current irreparable harm standard was well defined and developed through case authority. *Id.*

Lee Parsley discussed the irreparable harm standard and provided that in his experience as an appellate attorney, it was difficult to get the trial court to lower the supersedeas under the irreparable harm standard. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1450 (April 15, 2003). Therefore, Parsley requested that the legislature employ a more flexible standard where the trial court could examine the individual circumstances on a case-by-case basis. *Id.* at 1451.

Dan Byrne also expressed concern with retaining the irreparable harm standard–worrying that smaller

companies with assets of $200,000-$300,000, who were judgment debtors, would feel they did not have access to appellate courts and would thus not pursue appellate relief under the irreparable harm standard if retained. *Id.* at 1469.

f. Legislative History: Dissipation of Assets by Judgment Debtor Pending Appeal

Section 52.006 now provides the trial court with authority to prevent dissipation and transfer of assets to avoid satisfaction of the judgment. TEX. CIV. PRAC. & REM. CODE § 52.006(e).

Alan Waldrop, representing Texas for Lawsuit Reform, discussed the trial court's unfettered discretion to prevent dissipation of assets. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 2013 (May 7, 2003). He provided as follows:

> The whole idea of the supersedeas bond is to forestall collection efforts so that an appeal can be taken without collection efforts interfering with the business of the defendant. And so you want, you don't want to have an exception to this statute to swallow the very purpose for it.

Id. Waldrop suggested that language be added to prevent the dissipation of assets with an intent to defraud the judgment creditor and that the court not have injunctive power to interfere with the dissipation of assets in the ordinary course of business. *Id.*

Dan Byrne provided he did not have a problem with not requiring judgment debtors not superseding punitive damages awards but recommended that a new provision be added making it clear that it was inappropriate to engage in asset transfers outside the ordinary course of business. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1469 (Apr. 15, 2003). He contended that adding such a provision would make it clear that the reduced supersedeas requirements were not an invitation to engage in asset protection. *Id.*

B. Supreme Court Rules Committee Interpretation

As a result of House Bill 4, the Texas Supreme Court adopted conforming amendments to Texas Rule of Appellate Procedure 24.2 pertaining to money judgments. TEX. R. APP. P. 24.2. There were two issues that arose during committee meeting due to the statutory change: (1) the definition of net worth, and (2) the procedure to be used by a judgment debtor to supersede the judgment based on net worth. TEX. SUP. CT. ADVISORY COM. MTG. 9940-42 (Aug. 21, 2003) (afternoon session).

1. Defining Net Worth

The committee was cautioned that defining net worth would be a difficult feat including being faced with questions concerning what net worth includes, whether the judgment or insurance coverage should be considered in calculating net worth, and whether net worth is determined based on fair market value or according to generally accepted accounting standards. *Id.* at 9940. One member in addressing the difficulty of defining net worth mentioned the amount of time needed to write accounting definitions that would work for both U.S. and non-U.S. corporations and recommended that instead of providing a definition that the rule state that the judgment debtor must provide the basis for its conclusions as to its net worth. *Id.* at 9950.

Thus, the committee decided against defining net worth due to the number of disputes that could arise over what assets and liabilities were to be included in net worth and recognized that those battles would occasionally need to be fought out in the trial court. *Id.* at 9952.

2. Procedure for Superseding Money Judgment

The committee recognized that the judgment debtor needed to be provided a specific procedure to supersede the judgment in accordance with section 52.006. *Id.* at 9945. In regard to procedure, the committee considered three options for allowing a judgment debtor to supersede the judgment. *Id.* at 9941-42. The first option involved allowing the judgment debtor to file a supersedeas with the clerk's office based on fifty percent of its net worth, and the clerk would have a ministerial duty to accept the bond in that particular amount. *Id.* at 9941. Second, the judgment debtor could file some type of sworn statement or affidavit that would be taken as true unless contested. *Id.* at 9941-42. Third, the judgment debtor could make a motion with the court and establish its net worth before the court. *Id.* at 9942.

The committee also recognized the need for a method for the judgment creditor to challenge the affidavit filed by the judgment debtor, possibly through an evidentiary hearing. *Id.* at 9945, 9947. Justice Tom Gray, a committee member, noted there was a similar scheme under Texas Rule of Appellate Procedure 20.1 for challenging an affidavit of indigency. *Id.* at 9946.

Under Rule 20.1, when an affidavit of indigency is filed, the opposing party can challenge that affidavit, and a hearing is held. *Id.* at 9948. Further, Rule 20.1 put the burden of proof on the party claiming indigency, so that under Rule 24, the burden could be placed on the judgment debtor filing the net worth affidavit. *Id.* at 9948-49. Rule 20.1 provides eleven factors for claiming indigency, which could be modified under Rule 24. *Id.* at 9949.

The committee decided to go with a variation of the second option whereby the judgment debtor would post an affidavit providing its net worth and the amount of the supersedeas. *Id.* at 9943, 9946-47. Ultimately, the trial court would decide what the appropriate supersedeas would be through an evidentiary hearing if challenged by the judgment creditor. *Id.* at 9948.

3. Finding of Substantial Economic Harm

The Committee further recognized that section 52.006 only required the judgment debtor to show "substantial economic harm," not "irreparable harm," and decided to include a verbatim adoption of the statute in the rule. *Id.* at 9953-54. The discussion of this provision concentrated on whether there should be a different standard for money and non-money judgments. *Id.* at 9954-55. The consensus was it would be easier to maintain the same standard for all supersedeas rather than formulating different standards based on what type of judgment the judgment debtor was superseding. *Id.* at 9955-56.

IV. COMPARISON OF DIFFERENCES IN RULES AND RESOLUTION OF CONFLICTS

A. Textual Differences Between Texas Civil Practice & Remedies Code and Texas Rule of Civil Procedure 24.2

In section 52.006, the net worth provision states that the amount of security posted by the judgment debtor must not exceed the lesser of (1) fifty percent of the judgment debtor's **net worth**, or (2) $25 million. TEX. CIV. PRAC. & REM. CODE § 52.006(b). However Rule 24.2 provides that the amount of security is based on the judgment debtor's **current net worth**. TEX. R. APP. P. 24.2 (a)(1)(A).

B. Resolution of Conflicts

To the extent that section 52.006 conflicts with Texas Rule of Appellate Procedure 24.2, the Texas Civil Practice & Remedies Code controls. *See* TEX. CIV. PRAC. & REM. CODE § 52.005.

C. What Is Current Worth?

"Current" net worth means the judgment debtor's net worth when it posts security and files its net worth affidavit. *See* TEX. R. APP. P. 24.2(a)(1)(A). However, a judgment debtor's method of accounting and preparation of financial statements must be taken into consideration. For instance, a judgment debtor may prepare journal entries and create financial reports on a monthly or quarterly basis. If the judgment debtor posts its security and files its net worth affidavit mid-month or mid-quarterly cycle, the judgment debtor may only have the previous month's or previous quarter's financial information available from which to compute its net worth. Therefore, the judgment debtor should be allowed to file an affidavit of net worth based on that previous month's or previous quarter's financial records.

V. APPLICATION–CASES TO WHICH THE RULE APPLIES

The new enactment allowing the judgment debtor to post supersedeas in an amount not exceeding fifty percent of its net worth or $25 million applies to money judgments. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

A. Money Judgments

The new supersedeas requirements apply to cases involving money judgments where the judgment debtor is attempting to supersede the judgment to forestall collection efforts pending appeal. TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

VI. WHAT PORTION OF THE JUDGMENT MUST BE SUPERSEDED

Under section 52.006 and Rule 24.2, the judgment debtor must supersede (1) compensatory damages, (2) interest for the duration of the appeal, and (3) costs awarded in the judgment. TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1). However, punitive damages need not be superseded. TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

A. Defining Damages

Compensatory damages are economic and noneconomic damages, but not exemplary damages.

TEX. CIV. PRAC. & REM. CODE § 41.001(8). Economic damages encompass damages intended to compensate a claimant for actual economic or pecuniary loss and do not include noneconomic or exemplary damages. *Id.* § 41.001(4). Noneconomic damages include damages awarded to compensate a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages. *Id.* § 41.001(12). Exemplary damages are damages awarded as a penalty or by way of punishment, but not as compensatory damages. *Id.* § 41.001(5). Exemplary damages are neither economic or noneconomic damages but include punitive damages. *Id.*

B. Bonding of Future Damages

Under Chapter 74 of the Civil Practice and Remedies Code, when requested by a defendant physician or healthcare provider or claimant in a medical malpractice case, the court can order that future damages awarded be paid in whole or in part in periodic payments rather than by a lump sum payment. TEX. CIV. PRAC. & REM. CODE § 74.503(b). The court must make a specific finding providing the dollar amount of the periodic payments. *Id.* § 74.503(c). Further, periodic payments, other than future loss of earnings, terminate on the death of the recipient. *Id.* § 74.506(b).

Future damages are damages incurred after the date of judgment and do not include exemplary damages. *Id.* § 41.001(9). Future damages include medical, health care, or custodial care services, physical pain and mental anguish, disfigurement, physical impairment, loss of consortium, companionship, or society, or loss of earnings. *Id.* § 74.501(1).

The jury awards future damages based on the nature of the plaintiff's injuries, the medical care rendered before trial, and the plaintiff's condition at the time of trial. *Hughett v. Dwyre*, 624 S.W.2d 401, 405 (Tex.App.-Amarillo 1981, writ ref'd n.r.e.). Texas follows the "reasonable probability" rule for future damages, including future medical expenses. *City of San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex.App.-San Antonio 1988, writ denied); *Hughett*, 624 S.W.2d at 405.

The definition of future damages shows that such damages necessarily include compensatory damages because future damages are awarded to compensate a plaintiff for future economic and noneconomic damages. TEX. CIV. PRAC. & REM. CODE § 41.001(9). By statute, the judgment debtor is responsible for superseding compensatory damages. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1). Thus, the judgment debtor must post supersedeas in an amount for the present value of the future damages awarded in the judgment.

VII. LIMIT ON SUPERSEDEAS

The amount of the judgment that must be superseded is limited by both section 52.006 of the Texas Civil Practice and Remedies Code and Rule 24.2 of the Texas Rules of Appellate Procedure. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(b); TEX. R. APP. P. 24.2(a)(1). The judgment debtor must supersede the judgment by posting security in an amount of the lesser of fifty percent of its net worth or $25 million. TEX. CIV. PRAC. & REM. CODE § 52.006(b); TEX. R. APP. P. 24.2(a)(1). The cap on security for money judgments depends on the judgment debtor's net worth so that if there are multiple defendants to the judgment, then the amount of security required to supersede the judgment may be different for each judgment debtor. *See Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 911 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (concluding that the trial court abused its discretion by failing to provide an amount for each judgment debtor to supersede its portion of the judgment pending appeal).

VIII. FIFTY PERCENT OF JUDGMENT DEBTOR'S CURRENT NET WORTH

The enactment of section 52.006(a) and the corresponding amendments to Texas Rule of Appellate Procedure 24.2 have, in turn, spawned a new type of litigation—a separate proceeding, ancillary to the appeal—to determine the judgment debtor's net worth. With this new type of litigation, several new issues have evolved including (1) the treatment of assets and liabilities of any alter egos of the judgment debtor, (2) what assets and liabilities should be included in net worth, and (3) under what accounting method those assets and liabilities should be valued.

A. Assets and Liabilities of Judgment Debtor's Alter Egos

When determining a judgment debtor's net worth, an issue can arise regarding the treatment of the assets and liabilities of any alleged alter egos and whether those assets and liabilities must be included for purposes of the judgment debtor's net worth. The first question that must be considered is whether the alter ego entities were parties to the underlying action and judgment. If the alter egos were pleaded and served as parties in the underlying action and named as parties in the judgment, then the assets of the alter egos can clearly be included in the net worth determination for the judgment debtor or in a separate determination of the net worth of the alter egos because those parties are also liable for the judgment. The same result may not apply when alter egos were not pleaded or served in the underlying action and were not parties to the underlying judgment, but the judgment creditor raises the issue of alter ego during post-judgment net worth proceedings in an attempt to collect on its judgment.

1. <u>The Trial Court Does Not Have Continuing Jurisdiction to Determine Alter Ego During Post-Judgment Net Worth Proceedings</u>

The trial court has no continuing jurisdiction to determine alter ego in post-judgment net worth proceedings. If no motion for new trial is filed, a trial court loses jurisdiction to act in a case thirty days after the judgment becomes final. *See* TEX. R. CIV. P. 329b(d). However, Texas Rule of Appellate Procedure 24.3 provides that even after the trial court plenary power has expired, the trial court has continuing jurisdiction (1) to order the amount and the type of security and decide the sufficiency of sureties, and (2) to modify the amount or type of security required to continue suspension of the judgment's execution if circumstances change. TEX. R. APP. P. 24.3 (a).

Rule 24.3 does not provide the trial court with continuing jurisdiction to entertain new theories of imputing liability following rendition of judgment and expiration of plenary power. *See id.* Consequently, the trial court would inappropriately assume continuing jurisdiction where it entertained new theories of imputing liability, including alter ego, in post-judgment net worth proceedings. *See Harris County Children's Protective Services v. Olvera*, 971 S.W.2d 172, 175 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (holding the trial court erred in awarding attorney's fees after expiration of its plenary power).

2. <u>New Theories of Imputing Liability Cannot be Alleged Against Entities or Individuals Not Parties to the Underlying Action or Judgment</u>

A trial court cannot entertain new theories of liability against entities not parties in the underlying action or to the underlying judgment.

a. Alter Ego Cannot Be Lodged For the First Time During Post-Judgment Net Worth Proceedings

A trial court lacks subject matter jurisdiction to consider liability theories related to other entities brought after a judgment becomes final. *See Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987) (per curiam) (determining that the trial court and court of appeals lacked jurisdiction to consider a motion to unseal court records by a non-party to the underlying action). Judicial action taken after a trial court's plenary power has expired is void. *State ex. rel Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1990) (declaring an order signed after the expiration of the district court's plenary jurisdiction void). Subject matter jurisdiction is essential to the authority of the court to decide the case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Thus, the trial court lacks subject matter jurisdiction to disregard the corporate form of entities not parties to the underlying judgment during post-judgment net worth proceedings. *See Times Herald Printing Co.*, 730 S.W.2d at 649; *Latty*, 907 S.W.2d at 486; *Texas Ass'n of Bus.*, 852 S.W.2d at 443.

b. Alter Ego Involves a Question of Fact that Must be Submitted to the Finder of Fact

Alter ego is question of fact to be decided by the finder of fact. The Texas Supreme Court has long held that the different bases for disregarding the corporate fiction involve questions of fact. *See Castleberry v. Branscum*, 721 S.W.2d 270, 277 (Tex. 1986). Except in very special circumstances, fact questions must be determined by the finder of fact. *Id.* (*citing* TEX. CONST. art. I, § 15; *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975)). The Texas Supreme Court has firmly held that the controlling issues, based on pleadings and some evidence, of alternate bases for disregarding an alleged corporate fiction should be submitted to the finder of fact. *See id.* (*citing* TEX. R. CIV. P. 279). Accordingly, the judgment creditor waives its ability to seek collection based on alleged alter ego entities' net worth for the underlying judgment where it fails to submit pleadings on these separate entities in the underlying action. *See Castleberry*, 721 S.W.2d at 277.

3. Alter Ego Barred by Collateral Estoppel and the "One Satisfaction" Rule

A post-judgment claim of alter ego is barred by collateral estoppel and the "one satisfaction" rule. Allegations of alter ego, sham to perpetrate a fraud, and piercing of the corporate veil all involve theories of derivative liability. *El Paso Nat. Gas Co. v. Berryman*, 858 S.W.2d 362, 363-64 (Tex. 1993) (per curiam). Thus, these claims are subject to collateral estoppel and the "one satisfaction" rule if they are not litigated in the initial suit for liability. *See id.* at 364; *see also Beathard Joint Venture v. West Houston Airport Corp.*, 72 S.W.3d 426, 435-36 (Tex. App.–Texarkana 2002, no pet.) (determining alter ego claims were barred by res judicata, collateral estoppel, and time).

The doctrine of res judicata, which prevents relitigation of a claim or cause of action adjudicated and resolved by a final judgment, as well as matters that with the use of diligence should have been litigated in the earlier suit, bars the theory of alter ego post-judgment. *See State & Cty. Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696, 698 (Tex. 2001) (finding party not barred from asserting claims on which it did not have a full and fair litigation but that collateral estoppel barred the party from suing new parties regarding the subject matter of the previous suit). Accordingly, where a judgment creditor raises the theory of alter ego for the first time in post-judgment net worth proceedings against entities never made part of the underlying litigation, the theory comes too late because alter ego is a form of derivative liability that should be litigated through the creditor's diligence in the earlier suit. *See Berryman*, 858 S.W.2d at 363-64; *Beathard Joint Venture*, 72 S.W.3d at 426; *Miller*, 52 S.W.3d at 696.

4. Alter Ego Cannot Be Raised in Post-Judgment Proceedings Against Parties Never Sued

Alter ego cannot be raised for the first time during post-judgment net worth proceedings against parties never sued. Judgment shall not be rendered against one who was neither named nor served as a party defendant. *Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995) (*citing* TEX. R. CIV. P. 124). A plaintiff may not claim that another entity is not really separate from a defendant if the plaintiff fails to sue and serve the other person or entity. *Id.* at 870 (finding that where a trustee was not named a party to the suit, served process, and did not make a general appearance before the court in her capacity as trustee of the benefit plan, the judgment rendered against her as trustee was improper). Hence, unless waived by a general appearance, a court cannot confer a capacity on a unpleaded party. *Id.*

Accordingly, raising alter ego for the first time in post-judgment proceedings is prohibited where the judgment creditor (1) fails to plead the liability of the alleged alter egos in the underlying action; (2) fails to serve the alleged alter egos with its claims at any time during the underlying litigation; (3) the alleged alter egos never appeared in the underlying suit or post-judgment proceedings; and (4) the creditor never sought, and as a result, did not receive a judgment against the alleged alter egos. *Id.* To allow a judgment creditor to raise such a theory during post-judgment proceedings is tantamount to including the alter egos in the judgment and subjecting their assets to judgment enforcement.

5. Recovery Based on Alter Ego Theory Waived Where No Request Made for Finding of Liability

A plaintiff waives recovery based on alter ego when he fails to request submission of the theory. TEX. R. CIV. P. 279; *see also Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991) (finding a breach of contract claim waived where party did not request jury questions on cause of action). Thus, a judgment creditor waives any ability to pursue collection of the underlying judgment based on the net worth of alleged alter egos against whom it never sought a finding of liability. TEX. R. CIV. P. 279; *Southwestern Bell Tel. Co.*, 809 S.W.2d at 495.

6. Doctrine of Estoppel Bars Theory of Alter Ego

Where Party Acts with Full Knowledge of Existence of Alter Egos

The doctrine of estoppel bars a judgment creditor from seeking a finding of alter ego during post-judgment net worth proceedings. Several Texas cases have recognized that a party seeking to pierce the corporate veil may be estopped if it acts with full knowledge of the relationship between a corporation and the shareholder. *See Gensco, Inc. v. Canco Equip., Inc.*, 737 S.W.2d 345, 348 (Tex. App.–Amarillo 1987, no writ) (concluding the defendant must secure a finding that the plaintiff had knowledge of the essential facts of the relationship between the defendant and related entities and did business with the defendant despite that knowledge).

For example, in *Paine v. Carter*, 469 S.W.2d 822, 827 (Tex. App.–Houston [14th Dist.] 1971, writ ref'd n.r.e.), the court stated:

> [W]here a party knows of the relationship between a corporation and its shareholder and chooses freely and voluntarily to deal with them in their respective capacities, he is estopped to claim that the corporation is the alter ego of the individual (or the reverse thereof).

See also Minchen v. Van Trease, 425 S.W.2d 435, 438 (Tex. App.–Houston [14th Dist.] 1968, writ ref'd n.r.e.) (holding that the plaintiff could not contend that the corporation was the alter ego of the individual where he had extensive dealings with the corporation and its president, fully knew and understood he was dealing with a corporation, negotiated with the corporation through its president, received conveyances from the corporation signed by the president in his capacity as president, and was paid by the corporation); *Atomic Fuel Extraction Corporation v. Slick's Estate*, 386 S.W.2d 180, 190-91 (Tex. App.–San Antonio 1964), *writ ref'd n.r.e. per curiam*, 403 S.W.2d 784 (Tex. 1965) (holding that the plaintiff was estopped from raising the issue of alter ego because it was aware of the risks where it was never confused about the parties with whom it contracted, made its contracts with the entities knowing about the individual and his position with respect to the entities and that he was not a party to any contract, and never requested that the individual bind himself personally and continued to deal with the corporations).

Accordingly, where the judgment creditor proceeds to trial and obtains a judgment with full knowledge of the existence of any alleged alter egos, it is estopped from pursuing collection of the judgment against these other entities. *See Gensco, Inc.*, 737 S.W.2d at 348.

B. What is Net Worth?

Another problem that arises in determining a judgment debtor's net worth and deciding what assets and liabilities should be included in the calculation and under what method these assets and liabilities must be valued. As discussed, neither section 52.006 of the Texas Civil Practice and Remedies Code nor Rule 24.2 of the Texas Rules of Appellate Procedure define net worth. TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2. In fact, as discussed above, the legislative history and Supreme Court Rules Committee transcripts show that "net worth" was not defined in either the statute or the rule due to the necessary fact-specific determination that must be made as to each judgment debtor.

1. Defining Net Worth

Net worth must be determined on a case-by-case basis because a judgment debtor may use a different method of accounting and valuation of its assets and liabilities depending on whether it is an individual or business and if a business, depending on the industry in which it operates. *See* HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003) (recognizing that net worth would need to be determined on a case-by-case basis); TEX. SUP. CT. ADVISORY COM. MTG. 9952 (Aug. 21, 2003) (afternoon session) (same). While the legislature chose not to define net worth in the context of superseding money judgments, the term has been defined under both Texas and federal law in other contexts.

a. Texas Case Authority

In *Ramco*, the Fourteenth District Court of Appeals, recognizing there was no definition for "net worth" in section 52.006, examined the definition of the term "net worth" as follows:

> "Net worth" is a term used by laymen as well as professionals. Although it is a term of art in business and accounting, its meaning is the same in ordinary usage. Dictionaries define "net worth" as the amount by which resources exceed liabilities to creditors. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1519 (defining "net assets" as "the excess of value of resources over liabilities to creditors") & 1520 (defining "net worth" as a synonym of "net assets") (1993 ed.); *see also* ENCARTA WORLD ENGLISH DICTIONARY (defining "net worth" as "assets minus liabilities: the difference between assets and liabilities of a

> person or company."); INVESTOPEDIA (2000 ed.) (defining "net worth" as "the amount by which a company or individual's assets exceed their liabilities"). Law dictionaries assign the term the same meaning. *See* BLACK'S LAW DICTIONARY 1639 (8th ed. 2004) (stating that "net worth" is usually calculated as excess of total assets over total liabilities); BLACK'S LAW DICTIONARY 939 (5th ed. 1979) (defining "net worth" as the "[r]emainder after deduction of liabilities from assets"); MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996 ed.) (defining "net worth" as "the excess of the value of assets over liabilities").

Ramco, 171 S.W.3d at 912-13.

The *Ramco* court also noted Justice Gonzalez's concurring opinion in which he lamented the Texas Supreme Court's failure to follow his suggestion in *Lunsford v. Morris*[1] that the court define what "net worth" means in the context of the admission into evidence of a defendant's net worth for the purpose of determining what, if any, punitive damages should be assessed against that defendant. *Id.* at 915 (*citing Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 329-32 (Tex. 1993) (Gonzalez, J., concurring)).

b. Texas Staff Leasing Services Act

The Texas Staff Leasing Services Act provides as follows:

> Net worth of an applicant means the applicant's assets minus the applicant's liabilities, as shown on the applicant's financial statement or most recent federal tax return, plus the sum of any guarantees, letters of credit, or securities that may be submitted to the department.

TEX. LABOR CODE ANN. § 91.001(12) (Vernon Supp. 1996 & Supp. 2005). Thus, providing a financial statement or a copy of the most recent tax return is sufficient for an applicant under the Texas Staff Leasing Services Act to show net worth. *Id.* § 91.104(b). Further, the applicant should include adequate reserves for all taxes and insurance, including reserves for claims incurred but not paid and for claims incurred but not reported under plans of self-insurance for health benefits. *Id.* § 91.014(c). The applicant should compute net worth in accordance with section 448 of the Internal Revenue Code, which provides limitations of the use of cash method of accounting. *Id.*; 26 U.S.C. § 448.[2]

c. Texas Health Maintenance Organization Act

The Act governing health maintenance organizations provides as follows:

> Net worth means the amount by which total liabilities, excluding liability for subordinated debt issued in compliance with Article 1.39, is exceeded by total admitted assets.

TEX. HEALTH & SAFETY CODE ANN. § 843.002(20) (Vernon 1997). Thus, net worth is total admitted assets minus total liabilities. *Id.*, *see also* 28 TEX. ADMIN. CODE ANN. § 11.2302(1) (Vernon 1998) (regulating provider-sponsored health maintenance organizations and defining net worth as "the excess of total assets over total liabilities, excluding fully subordinated debt or subordinated liabilities").

d. Other Texas Statutes

Other Texas statutes define net worth as "assets minus liabilities." For example, statutes governing Texas coal mining define net worth as total assets minus liabilities and equivalent to owner's equity. 16 TEX. ADMIN. CODE ANN. § 12.309(j)(1)(F) (Vernon 1998); *see also* 30 TEX. ADMIN. CODE ANN. §§ 37.11(6); 336.802(11) (Vernon 2003) (same).

The Texas Department of Licensing and Regulation for vehicles defines net worth as the excess of total assets over total liabilities as reflected in audited financial statements. 16 TEX. ADMIN. CODE ANN. § 71.10(3) (Vernon 2004). The Texas Department of Insurance statutes regulating the Texas Medical Liability Insurance Underwriting Association define net worth as the difference between assets and liabilities:

[1] *See Lunsford v. Morris*, 746 S.W.2d 471, 472-73 (Tex. 1988) (changing Texas common law and holding for the first time in Texas that evidence regarding a party's "net worth" is discoverable and admissible in evidence if punitive damages are sought against that party and in which Justice Gonzalez's dissent warned that practitioners would be confused because "net worth" was not defined).

[2] Section 448 disallows the use of cash basis accounting for C-corporations, partnership in which a C-corporation is a partner, and tax shelters. 26 U.S.C. § 448(a). However, cash basis accounting is allowed for (1) farming businesses, (2) personal service corporations, (3) entities with gross receipts of less than $5,000,000. *Id.* § 448(b).

> As used in this subclause, 'net worth' shall be calculated by determining the excess, if any, of the plan's total assets over the plan's total liabilities.

28 TEX. ADMIN. CODE ANN. § 5.2004(a)(5)(E)(vii)(I) (Vernon 2005); *see also* TEX. INS. CODE ANN. 843.002(20) (defining net worth as the amount by which total liabilities is exceeded by total admitted assets).

e. Federal Regulations and Cases

The Federal Deposit Insurance Corporation's rules of practice and procedure recognize net worth as "the excess of total assets over total liabilities." 12 C.F.R. § 308.177(b)(2).

Further, federal cases have defined net worth consistent with the principles underlying the statutes in which the term is used. For example, the Seventh Circuit Court of Appeals reasoned that "net worth," as used in the Fair Debt Collection Practices Act ("FDCPA"), should be calculated as assets minus liabilities under Generally Accepted Accounting Principles ("GAAP"), but that such calculation should be in accordance with the "primary purpose" of the FDCPA – to ensure that defendants are protected from having to liquidate all of their assets to satisfy a punitive damages award. *See Sanders v. Jackson*, 209 F.3d 998, 1002 (7th Cir. 2000); *see also Broaddus v. United States Army Corps of Engineers*, 380 F.3d 162, 167 (4th Cir. 2004) (providing that net worth under the Equal Access to Justice Act is computed by subtracting liabilities from assets).

Further, the Seventh Circuit Court of Appeals concluded that the plain meaning of "net worth" in the Equal Access Justice Act was the difference between total assets and total liabilities determined in accordance with GAAP. *Contintental Web Press, Inc. V. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985), *disapproved of on other grounds by*, *Comm'r, INS v. Jean*, 496 U.S. 154, 160- 66, 110 S.Ct. 2316, 2319-23, 110 L.Ed.2d 134 (1990). The Court concluded as follows:

> Congress did not define the statutory term "net worth." It seems a fair guess that if it had thought about the question, it would have wanted the courts to refer to generally accepted accounting principles. What other guideline could there be? Congress would not have wanted us to create a whole new set of accounting principles just for use in cases under the Equal Access to Justice Act. The proceeding to recover attorney's fees under the Act is intended to be summary; it is not intended to duplicate in complexity a public utility commission's rate of return proceeding.

Id.

2. Methods of Accounting

The method of accounting utilized by a judgment debtor will fluctuate depending on whether the debtor is an individual or a business and if a business, the industry in which the judgment debtor operates.

a. Generally Accepted Accounting Principles (GAAP)

Generally Accepted Accounting Pprinciples ("GAAP") is a widely accepted set of rules, conventions, standards, and procedures for reporting financial information, established by the Financial Accounting Standards Board ("FASB").

Several federal cases and at least one case from Texas have concluded that net worth means assets minus liabilities in accordance with GAAP. *See, e.g.*, *Broaddus v. United States Army Corps of Eng'rs*, 380 F.3d 162, 166-67 (4th Cir. 2004) (holding that the unambiguous meaning of "net worth" under the Equal Access to Justice Act was total assets less total liabilities in accordance with GAAP); *Sanders v. Jackson*, 209 F.3d 998, 999-1002 (7th Cir. 2000) (holding that the plain meaning of "net worth" under the Fair Debt Collection Practices Act was total assets less total liabilities according to GAAP, which is balance-sheet or book net worth); *Kuhns v. Board of Governors of Federal Reserve System*, 930 F.2d 39, 41-42 (D.C. Cir. 1991) (holding that "net worth" under the Equal Access to Justice Act must be calculated in accordance with GAAP); *see also Castelli v. Tolibia*, 83 N.Y.S.2d 554, 564 (Sup. Ct. 1948) (stating that "net worth" has a well-defined meaning, which is the remainder after the deduction of liabilities from assets).

The Fourteenth District Court of Appeals has also determined that the plain meaning of "net worth," as used in section 52.006 of the Texas Civil Practice and Remedies Code and Rule 24, is the difference between total assets and total liabilities determined in accordance with GAAP. *Ramco*, 171 S.W.3d at 914.

(1) What Types of Judgment Debtors Use GAAP

The Texas Administrative Code provides that companies issuing publicly-traded stock and reporting to the Texas Securities Board must calculate their net worth

according to GAAP. 7 TEX. ADMIN. CODE ANN. § 141.1(b)(20) (Vernon 1992) (regulating the registration of programs formed to own equipment and defining net worth as the excess of total assets over total liabilities as determined by generally accepted accounting principles including depreciation, if applicable); § 129.1(b)(16) (Vernon 1997) (governing registration of asset-backed securities and defining net worth as the excess of total assets over total liabilities as determined by generally accepted accounting principles.); § 117.1(b)(23) (Vernon 1994) (regulating the registration of real estate programs and defining net worth as the excess of total assets over total liabilities as determined by generally accepted accounting principles including depreciation, if applicable).

(a) Valuing Assets under GAAP

Several federal cases have found that when using GAAP, assets are calculated at their cost of acquisition–not based on appraisal or fair market value. *See, e.g., Broaddus*, 380 F.3d at 167; *City of Brunswick v. United States*, 849 F.2d 501, 503 (11th Cir. 1988); *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 590 (9th Cir. 1986); *Continental Web Press, Inc. v. NLRB,* 767 F.2d 321, 323 (7th Cir. 1985).

In *Broaddus*, the Fourth Circuit Court of Appeals reasoned that computation of net worth should be achieved by subtracting liabilities from assets, where the assets are valued at their acquisition cost, not their fair market value, joining its sister circuits by applying this prevailing and uncontradicted view of asset determination. *Broaddus*, 380 F.3d at 170.

The Ninth, Eleventh, and Seventh Circuit Courts of Appeals have also concluded that where GAAP is used, an asset's value should not be based on an appraisal or fair market value, but on the cost of acquisition. *See United States v. 88.88 Acres of Land*, 907 F.2d 106, 107 (9th Cir. 1990) (using acquisition costs to determine the value of assets); *City of Brunswick*, 849 F.2d at 503 (same); *American Pacific Concrete Pipe Co.*, 788 F.2d at 590 (same); *Continental Web Press, Inc.*, 767 F.2d at 323 (same). Net worth must be derived from a company's books rather than an appraisal. *Continental Web Press, Inc.*, 767 F.2d at 323. Thus, when GAAP applies, the valuation of a company's assets should be based on the cost of acquisition. *See id.*

(2) Other Comprehensive Bases of Accounting ("OCBOA")

However, other bases of accounting, called Other Comprehensive Bases of Accounting ("OCBOA") are also widely used as an alternative to GAAP. Statement of Auditing Standards No. 62 allows OCBOA to be utilized under a GAAP-like framework. SAS No. 62. It should be emphasized that no case cited adopting the GAAP principles for determining net worth even mention whether OCBOA were considered. Accordingly, OCBOA values should be utilized in determining net worth in the appropriate context.

(a) Description of OCBOA

OCBOA are described as follows:

> (1) the basis of accounting the reporting entity used to comply with the requirements or financial reporting provisions of a governmental regulatory agency to whose jurisdiction the entity is subject;
>
> (2) the basis of accounting the reporting entity uses or expects to use to file its income tax return for the period covered by the financial statements;
>
> (3) the cash receipts and disbursements basis of accounting, and modifications of the cash basis having substantial support such as recording depreciation on fixed assets or accruing income taxes; and
>
> (4) a definite set of criteria having substantial support that is applied to all material items appearing in financial statements, such as the price-level basis of accounting.

SAS No. 62.

(b) What Characteristics Must an Entity Exhibit to Be a Candidate for Using OCBOA?

Entities that are good candidates for utilizing OCBOA usually have the following characteristics: (1) there are no third-party users of the financial statements; (2) the entity's debt is secured; (3) the entity's creditors do not require GAAP financial statements; (4) the cost of complying with GAAP would exceed the benefits; (5) the owners and managers are closely involved in the day-to-day operations of the business and have a fairly accurate picture of the entity's financial position; (6) the owners are primarily interested in cash flow; (7) the owners are primarily interested in tax implications of transactions; (8) capital expenditures and long-term financing are not significant; and (9) IRS regulations do not require the

entity to prepare its tax return on the accrual basis of accounting. AICPA *Compilation and Review Alert*–1996/1997.

(c) Types of OCBOA

The most common OCBOA are cash and modified cash bases and tax basis. Use of the pure cash basis is rare and is generally limited to nonbusiness entities with simple operations, including school activity funds, fairs and other civil ventures, trusts and estates, political action committees, and political campaigns. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 101.6. When using a pure cash basis, only transactions that increase or decrease cash or cash equivalents are reflected in the company's financial statements (not liabilities) and transactions are reflected not as they occur but as cash is received or disbursed. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 400.2; 402.1. Thus, a cash basis entity considers only cash and cash equivalents, investments, property and equipment, borrowings, withholdings, and taxes when calculating its cash balance. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 402.2-402.8.

Use of the modified cash basis is more common, but should be limited to entities oriented toward cash receipts and disbursements, not significantly influenced by financing of sales or purchases, and relatively simple. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 101.7. Modified cash basis is characterized as "the pure cash basis incorporating 'modifications of the cash basis having substantial support'." PPC's Guide to Cash, Tax, and Other Bases of Accounting § 400.4 (*citing* SAS No. 62). These modifications generally involve recognizing some transactions on an accrual basis as with GAAP such as payroll taxes, pension plan contributions, and depreciation. *Id.*

Tax basis accounting is the basis of accounting that an entity uses or expects to use to file its income tax return and is typically used by entities that are either profit-oriented enterprises, partnerships whose agreements require use of such method, and non-profits. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 101.8; 500.1. Because the income tax laws determine taxable income, this basis focuses on the measurement of revenues and expenses and possibly on the determination of assets and liabilities. *Id.* § 500.1. The Internal Revenue Code describes two accounting methods: (1) cash basis, and (2) accrual basis. *Id.* § 500.8. Entities carrying inventory are normally required to use the accrual basis. *Id.* § 500.9.

Other less common bases include (1) regulatory basis, (2) price-level basis, (3) current-value basis, (4) liquidation basis, and (5) agreed-upon basis. *Id.* § 101.9, 602. Regulated companies, such as insurance companies, credit unions, construction companies, and non-profits, must report financial information to federal, state, or local governmental agencies. *Id.* §§ 601.1-601.2. This reporting basis sometimes differs from GAAP due to the unique reporting requirements required by the agencies so that these types of companies are allowed to report on a regulatory basis. *Id.* § 601.1.

3. Problems with Valuing Assets and Liabilities for Net Worth Purposes

Further, problems arise when determining the assets and liabilities a judgment debtor must include in computing its net worth. See TEX. SUP. CT. ADVISORY COM. MTG. 9940 (Aug. 21, 2003) (afternoon session). The ultimate question that the judgment debtor must ask when determining whether an item must be included in its net worth calculation is whether that item may be considered in determining its ability to pay the judgment. *See TransAmerican Natural Gas Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex.App.–San Antonio 1995, pet. dism'd).

a. Insurance Policies

Is an insurance policy an asset? During the Supreme Court Rules Committee meeting, Professor Dorsaneo believed that liability insurance would be an asset once a judgment was rendered against a judgment debtor. TEX. SUP. CT. ADVISORY COM. MTG. 9951 (Aug. 21, 2003) (afternoon session). Professor Elaine Carlson countered that "[f]rom the accountant's perspective, insurance is only an asset if it has some value." *Id.* Carlson then explained that while she believed the policy had great value that accountants may differ in opinion. *Id.* Mr. Schenkkan then noted that the question wasn't whether the policy had value but whether it counts for purposes of net worth. *Id.* He explained that the policy did not enable the judgment debtor to obtain more cash to supersede the judgment. *Id.* at 9952.

During the legislative hearings, Dan Byrne, from Texans for Civil Justice, explained that insurance was an important factor in determining supersedeas relief. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1469 (May 7, 2003). He mentioned that a lot of insolvent judgment debtors might have insurance coverage. *Id.* In lieu of having an insurance coverage factor in addition to consideration of net worth, Byrne requested that the legislature define net

worth to include available coverage. *Id.* When questioned regarding the need to consider insurance, Waldrop provided that if the judgment debtor had insurance, then a bond was not needed. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 2015 (May 7, 2003). Waldrop explained that the insurance policy could not be dissipated so there was no need to either lower or raise the requirement of supersedeas when insurance coverage was involved. *Id.* However, this did not take into consideration "wasting policies."[3]

Further, the Texas Supreme Court has held that punitive damage liability coverage is not an asset that can be considered in assessing a defendant's financial standing for purposes of punitive damages awards and that the jury cannot hear evidence of a defendant's insurance coverage. *See* Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments On Appeal After House Bill 4*, 46 S. Tex. L. Rev. 1035, 1081 n. 282 (2005) (*citing Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 41 (Tex. 1998); *Rojas v. Vuocolo*, 177 S.W.2d 962, 964 (Tex. 1944)).

In sum, both the legislature and Supreme Court Rules Committee were faced with the question of whether to consider the judgment debtor's insurance coverage in determining net worth and neither elected to specifically provide that such coverage constitute an asset to the judgment debtor. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2. Including insurance coverage as an asset would require a judgment debtor to bond the judgment based on an illiquid asset that could not be used as collateral. The supersedeas amendments were designed to promote fairness and efficiency in civil lawsuits, protect Texas citizens and courts from abusive litigation tactics, remove incentives causing unwarranted delay and expense, and restore the balance in the court system to operate more efficiently and fairly and less costly. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199 (February 26, 2003).

b. Judgment

Is the judgment a liability when calculating a judgment debtor's net worth?

A judgment most certainly affects a judgment debtor's ability to supersede the judgment. *See TransAmerican Natural Gas Corp.*, 905 S.W.2d at 414. In fact, a judgment debtor may be unable to secure a bond due to the size of the judgment rendered against it. *See* HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003) (noting that "[m]any defendants find it difficult to pursue appeals because they cannot afford the high costs of an appeal bond. In many cases, the cost of the bond makes the end of the suit at the time of judgment and not after a rightfully brought appeal"); Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199 (February 26, 2003) (providing that due to the size of some judgments out of Texas courts it was near impossible to get a bond and appeal without liquidating a company).

Accordingly, in tandem with the intent of the amendment, the court should consider whether the accounting method utilized by the judgment debtor mandates that the judgment be included for purpose of calculating the debtor's net worth and whether omitting it from the calculation could result in the judgment debtor being unable to secure adequate resources to appeal the judgment.

c. Potential *Stowers* Action

What about a potential *Stowers* action against the insurer? A *Stowers* action is an action against an insurance company for the negligent failure to settle an insurance claim within policy limits. *See G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Com. App. 1929, holding approved). The *Stowers* duty to settle is not activated unless three prerequisites are met: (1) the claim against the insured is within the scope of coverage, (2) the claimant has made a settlement demand that is within the policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex.1994). However, an insurer has no duty to settle claims not covered by the policy. *Id.* at 848.

A *Stowers* action accrues when the judgment against the insured becomes final rather than when the insured actually makes an excess payment to the original plaintiff. *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598 (Tex. 1998) (*citing Hernandez v. Great American Ins. Co.*, 464 S.W.2d 91 (Tex.1971)). "A judgment is final

[3] A "wasting policy," also called a "self liquidating," "eroding limits," or "defense within limits" policy, is a policy which limits the total amount paid for the sum of defense costs and indemnity for liability. John A. Edginton, *Admiralty Law Institute Symposium: Towage, Salvage, Pilotage, and Pollution, Ethics at Sea: Ethics Issues for Maritime Lawyers and Insurers*, 70 TUL. L. REV. 215, 442 (December 1995) (*citing* Shaun McParland Baldwin, *Legal and Ethical Considerations for "Defense Within Limits" Policies*, 61 DEF. COUNS. J. 89 (1994).

for the purposes of bringing a *Stowers* action if it disposes of all issues and parties in the case, the trial court's power to alter the judgment has ended, and execution on the judgment, if appealed, has not been superseded." *Id.*

Because a *Stowers* recovery is speculative at the time the judgment debtor calculates its net worth and posts its net worth affidavit, the judgment debtor should not be forced to include any potential recovery as an asset in its net worth determination.

IX. NET WORTH AFFIDAVIT

A judgment debtor, who supersedes a money judgment based on net worth, must post security and simultaneously file an affidavit that states its net worth with complete, detailed information concerning its assets and liabilities from which its net worth can be ascertained. TEX. R. APP. P. 24.2(c)(1). The affidavit is considered prima facie evidence of the debtor's net worth. *Id.*

Otherwise, neither the statute nor the rule provide additional requirements for the judgment debtor's net worth affidavit. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(b); TEX. R. APP. P. 24.2(c)(1). However, in exercising caution, the judgment debtor should provide a sworn affidavit setting out the amount of its individual assets and liabilities and its corresponding net worth as of a specific date in time. Further, if the values are obtained from financial statements and reports, the judgment debtor should attach a copy of those statements and reports to its affidavit and detail (1) the accountant or accounting firm that made the determination, and (2) what accounting method was used. It would also be helpful to attach a letter from the judgment debtor's accountant or accounting firm providing whether the financial statements and reports used in determining net worth were audited or unaudited.

X. CONTEST TO NET WORTH

A. Challenge to Net Worth Affidavit

After the judgment debtor supersedes the judgment and files a net worth affidavit, the judgment creditor can challenge **the judgment debtor's net worth affidavit**. TEX. R. APP. P. 24.2(c)(2).

1. Need Not Be Sworn

While the judgment debtor's net worth affidavit must be sworn, the judgment creditor's net worth contest does not need to be sworn. TEX. R. APP. P. 24.2(c)(1), (2).

2. No Specific Form

Further, there are no guidelines within section 52.006 or Rule 24.2 that explain what information the judgment creditor must include in its net worth contest. Thus, presumably the contest can encompass one line of text wherein the judgment creditor states it contests the debtor's net worth affidavit or can be several pages long wherein the judgment creditor sets out the basis of its challenge, noting the specific asset and liability amounts submitted by the judgment debtor that it contests. *See id.*

B. Discovery in Conjunction with Contest

Further, in conjunction with its contest, the judgment creditor can conduct reasonable discovery concerning the judgment debtor's net worth. TEX. R. APP. P. 24.2 (c)(2).

1. What Type of Discovery Does the Judgment Debtor Have to Answer?

The only issue of importance during the net worth contest is the value of the judgment debtor's assets and liabilities and consequently its net worth. TEX. R. APP. P. 24.2 (a)(1), (c)(1), (2), (3). Rule 24.2 provides that the judgment debtor is required to post supersedeas in an amount not exceeding fifty percent of its current net worth. *Id.* at 24.2(a)(1)(A).

Information necessary to test the accuracy of the judgment debtor's net worth affidavit would include only information concerning the **current assets** and **current liabilities** of the judgment debtor. *See id.* Thus, presumably the rule gives the judgment creditor authority to request only information relevant to the judgment debtor's **current** net worth, including the assets and liabilities shown on the net worth statement and attached financial statements and reports or assets or liabilities the judgment creditor believes that the judgment debtor failed to include in the affidavit. See *id.* 24.2(a)(1)(A); (c)(1). Thus, any onerous requests for valuations of assets and liabilities for time periods preceding the time at which the judgment creditor's claim arose and unhelpful to determining the debtor's current net worth would fall outside the scope of the rule. *See id.* 24.2(c)(2).

2. Is the Judgment Creditor Required to Conduct Discovery?

Rule 24.2 provides the judgment creditor **may** conduct discovery. TEX. R. APP. P. 24.2(c)(2). So, is the

judgment creditor required to seek such discovery before seeking a hearing on its net worth contest? Probably not.

Texas courts apply the same rules of construction to rules of procedure as to statutes. *In re VanDeWater*, 966 S.W.2d 730, 732 (Tex. App.–San Antonio 1998, no pet.); *Burrhus v. M & S Supply, Inc.*, 933 S.W.2d 635, 640 (Tex.App.–San Antonio 1996, writ denied). When a rule of procedure is clear, unambiguous, and specific, the court construes its language according to its literal meaning. *Murphy v. Friendswood Dev. Co.*, 965 S.W.2d 708, 709 (Tex. App.–Houston [1st Dist.] 1998, no pet.). The court avoids constructions giving rise to constitutional infirmities. TEX. GOV'T CODE ANN. § 311.021(1) (Vernon 2005). Rule interpretation is "a pure question of law over which the judge has no discretion." *Mitchell*, 943 S.W.2d at 437.

It is presumed that the legislature used words in a statute in the sense in which they are ordinarily understood. *Connors v. Connors*, 796 S.W.2d 233, 237 (Tex.App.–Fort Worth 1990, writ denied); *Calvert v. Austin Laundry & Dry Cleaning Co.*, 365 S.W.2d 232, 235 (Tex.Civ.App.–Austin 1963, writ ref d n.r.e.). When "may" is used in a statute, it creates discretionary authority or grants permission or a power unless the context in which the phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute. TEX. GOV'T CODE ANN. § 311.016(1) (Vernon 2005).

Further, "must" creates or recognizes a condition precedent. *Id.* at § 311.016(3). A condition precedent is an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. BLACK'S LAW DICTIONARY 312 (8th ed. 2004). If the condition does not occur and is not excused, the promised performance need not be rendered. *Id.* Webster's defines "must" as an obligation or a requirement. WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 1492 (3rd ed. 1993).

Thus, presuming that the rules committee used words in the sense in which they are commonly understood and applying the construction rules, the rule gives the judgment creditor discretionary authority or permission to conduct reasonable discovery if it contests the judgment debtor's net worth affidavit. *See* TEX. R. APP. P. 24.2(c)(2); TEX. GOV'T CODE ANN. § 311.016; *Connors*, 796 S.W.2d at 237. Because the judgment creditor's authority is discretionary, the judgment creditor is not required to conduct net worth discovery before seeking a hearing on its net worth contest. *See* TEX. GOV'T CODE ANN. § 311.016; TEX. R. APP. P. 24.2(c)(2). However, the judgment creditor proceeds to the net worth contest without having conducted net worth discovery at its own risk.

XI. HEARING ON JUDGMENT CREDITOR'S NET WORTH CONTEST

After the judgment creditor files its contest of the judgment debtor's net worth affidavit, the trial court must hold an evidentiary hearing. TEX. R. APP. P. 24.2(c)(3).

A. Net Worth Discovery Foreclosed Once Hearing Begins

The trial court must promptly hear a judgment creditor's contest only **after any discovery** has been completed. *Id.* Consequently, the plain language of the rule shows that the judgment creditor is foreclosed from seeking net worth discovery if it proceeds to an immediate hearing on its net worth contest without seeking net worth discovery. *See id.*

Rule 24.2(c)(3) requires the trial court to hold a hearing only after any net worth discovery has been completed. TEX. R. APP. P. 24.2(c)(3). Thus, the plain language of Rule 24 suggests that the judgment creditor is foreclosed from seeking such discovery following the hearing. *See* TEX. R. APP. P. 24.2(c)(3); TEX. GOV'T CODE § 311.011. Thus, just as with a trial, the judgment creditor should be foreclosed from seeking any net worth discovery once it proceeds to the net worth contest hearing. *See* TEX. GOV'T CODE § 311.011.

B. Trial Court's Evidentiary Hearing

The trial court must hold a evidentiary hearing during which the judgment debtor and judgment creditor offer evidence on the judgment debtor's net worth. TEX. R. APP. P. 24.2(c)(3).

1. Judgment Debtor Has Burden of Proof

The judgment debtor has the burden of proving its net worth at the evidentiary hearing. TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(c)(3); *see also Ramco*, 171 S.W.3d at 910. So, what exactly is the judgment debtor's burden?

a. Defining Burden of Proof

Black's Law Dictionary defines "burden of proof" as "[a] party's duty to prove a disputed assertion or charge." BLACK'S LAW DICTIONARY 209 (8th ed. 2004). Burden of proof includes both the burden of persuasion

and the burden of production. *Id.* The burden of persuasion is "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.* The burden of production is "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." *Id.* One commentator has explained "burden of proof" as follows:

> In the past the term "burden of proof" has been used in two different senses. (1) The burden of going forward with the evidence. The party having this burden must introduce some evidence if he wishes to get a certain issue into the case. If he introduces enough evidence to require consideration of this issue, this burden has been met. (2) Burden of proof in the sense of carrying the risk of nonpersuasion. The one who has this burden stands to lose if his evidence fails to convince the jury—or the judge in a nonjury trial. The present trend is to use the term "burden of proof" only with this second meaning . . . .

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 78 (3d ed. 1982). Another commentator stated as follows:

> The expression "burden of proof" is tricky because it has been used by courts and writers to mean various things. Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law. Burden of proof is sometimes used in a secondary sense to mean the burden of going forward with the evidence. In this sense it is sometimes said that a party has the burden of countering with evidence a prima facie case made against that party.

William D. Hawkland, *Uniform Commercial Code Series* § 2A-516:08 (1984).

b. Preponderance of the Evidence

Texas Rule of Appellate Procedure provides only that the judgment debtor has the burden of proof, without explaining exactly what that burden entails. *See* TEX. R. APP. P. 24.2(c)(3). However, the judgment debtor should only have to prove his net worth by a preponderance of the evidence.

"No doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence." *Sanders v. Harder*, 227 S.W.2d 206, 209 (Tex. 1950). In fact, over a century ago, the Texas Supreme Court rejected the view that "facts [must] be established by evidence with that absolute certainty . . . that excludes all reasonable doubt of their existence, as if it were a case of murder or treason . . . ." *Sparks v. Dawson*, 47 Tex. 138, 145 (1877). Seeking to avoid a blurring of the distinction between civil and criminal cases, the Court has regularly found reversible error when a trial court instructed a jury that a greater burden must be met. *See Bluntzer v. Deewes*, 15 S.W. 29, 30 (Tex. 1891) (finding reversible error in a charge requiring "a preponderance of the evidence . . . with such certainty as will satisfy your minds"); *Wylie v. Posey*, 9 S.W. 87, 88-90 (Tex. 1888) (holding there was reversible error in a charge requiring "a sufficient preponderance of the evidence, to the extent of a reasonable certainty"). In fact, only in extraordinary circumstances has the Court imposed a more onerous burden, abandoning the well-established preponderance of the evidence standard. *See Ellis County State Bank v. Keever*, 888 S.W.2d 790, 792 n.5 (Tex. 1994).

Further, during the formulation Rule 24.2, committee members discussed the similarity between the challenge of an indigency affidavit under Rule 20.1 and a challenge of a judgment debtor's net worth affidavit under Rule 24.2. *See* TEX. SUP. CT. ADVISORY COMM. MTG. 9945-48 (Aug. 21, 2003) (afternoon session). Notably, the committee discussed the burden of proof under 20.1 and decided to import to the same burden to a judgment debtor filing a net worth affidavit under 24.2. *See id.* at 9948-49. Under Rule 20.1, "the test for indigence is whether a preponderance of the evidence shows that the party would be unable to pay costs 'if he really wanted to and made a good faith effort to do so.'" *Thomas v. Olympus/Nelson Prop. Mgmt.*, 97 S.W.3d 350, 352 (Tex.App.–Houston [14th Dist.] 2003, no pet.). Because the committee showed its intent to design a net worth affidavit scheme similar to the one provided in 20.1, use of the preponderance of the evidence by the judgment debtor to prove his net worth is further supported by the use of that same standard under Texas Rule of Appellate Procedure 20.1. *See* TEX. R. APP. P. 20.1(e). Thus, the judgment debtor need only prove its net worth by a preponderance of the evidence.

2. <u>Judgment Creditor Has No Burden</u>

However, the rule does not seem to place any burden upon the judgment creditor requiring only that the judgment creditor file a contest that need not even be

sworn. *See* TEX. R. APP. P. 24.2(c)(2), (3). Thus, it appears that the judgment creditor can chose to offer no evidence or argument at the hearing. *See id.*

3. Types of Evidence Admissible at Hearing

The hearing on the judgment creditor's net worth contest is akin to a mini-trial where the judgment debtor needs to offer both documentary and testamentary evidence to prove its net worth. *See* TEX. R. APP. P. 24.2(c)(3).

a. Documentary Evidence

The debtor should offer documentary evidence to support the value of his assets and liabilities. *See* TEX. R. APP. P. 24.2(c)(3) (providing that the judgment debtor has the burden of proof to prove its net worth). To demonstrate the value of its assets, a judgment debtor may need to admit (1) statements for checking and savings accounts; (2) property appraisals for homestead, rental, or business property; (3) purchase invoices and any corresponding depreciation schedules for any business equipment; (4) inventory statements; (5) statements of accounts receivable and the corresponding bad debt ratio; (6) National Automobile Dealers Association ("NADA") or Kelley Blue Book values for automobiles; (7) statements for investment accounts, retirement accounts, or insurance policies; (8) financial statements showing interests in other business entities; (9) documentation of any prepaid expenses; (10) documentation of intangible assets such as goodwill and patents; and (11) tax returns.

To demonstrate the value of its liabilities, the judgment debtor will need to admit (1) account payable statements including credit cards; (2) loan statements for automobiles, mortgaged property, and other encumbered property; (3) property tax statements; and (4) statements showing accrued benefits and payroll obligations.

b. Testimonial Evidence

The judgment debtor may need to provide testimony regarding the value of its assets and liabilities in addition to providing expert accounting testimony to explain valuation of the assets and liabilities and the corresponding calculation of net worth. *See* TEX. R. APP. P. 24.2(c)(3) (providing that the judgment debtor has the burden of proving its net worth).

(1) Testimony from Judgment Debtor

The judgment debtor or a representative of the judgment debtor can testify regarding the value of its assets and liabilities. A property owner is qualified to testify to the market value of his property. *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) (*citing Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984)) (allowing opinion testimony by an owner to establish market value of his property). The evidence is probative if based on the owner's estimate of market value and not some intrinsic value or replacement cost value. *Id.* (*citing Porras*, 675 S.W.2d at 504-05).

(2) Testimony from an Accountant

The judgment debtor may also need to offer expert testimony especially from an accountant, who can explain the proper valuation of its assets and liabilities in accordance with the accounting method utilized by the judgment debtor. However, the use of expert testimony presents the possibility of a *Daubert/Robinson* challenge. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

(a) Factors Examined in Determining Reliability of Expert Testimony

An expert's testimony must be reliable. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise." *Pleasant Glade Assembly of God v. Schubert*, 174 S.W.3d 388, 400 (Tex.App.–Fort Worth 2005, pet. filed). Accordingly, if the judgment debtor wishes to admit testimony from its accountant to explain the preparation of its financial statements and reports and consequently its net worth statement, the judgment debtor will need to ensure that the proffered testimony is reliable.

To gauge reliability, the trial court must evaluate the methods, analysis, and principles relied upon in reaching the opinion and should ensure that the expert's opinion comports with applicable professional standards outside the courtroom and that it has a reliable basis in the knowledge and experience of the discipline. *Pleasant Glade Assembly of God*, 174 S.W.3d at 401 (*citing Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *Gammill*, 972 S.W.2d at 725-26; *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001)).

The Texas Supreme Court has crafted two approaches for determining whether expert testimony is

reliable: (1) the *Robinson* factors, and (2) the *Gammill* analytical gap test. *Pleasant Glade Assembly of God*, 174 S.W.3d at 401. For expert testimony to be admissible (1) the expert must be qualified, and (2) the expert opinion must be relevant to the issues involved in the case and based on a reliable foundation. *See* TEX. R. EVID. 702; *Robinson*, 923 S.W.2d at 556; *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720-21, 726-27 (Tex. 1998). The non-exclusive factors set out in *Robinson* include as follows: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

(b) Judgment Debtor Will Need to Preserve Challenge to Judgment Creditor's Expert Testimony, If Any

Conversely, the judgment debtor will need to preserve any challenge to expert testimony proffered by the judgment creditor. To preserve a complaint that expert opinion evidence is inadmissible due to unreliability, the judgment debtor must object to the evidence either before trial or when the evidence is offered. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 251-52 (Tex. 2004); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998).

The judgment debtor should file a written objection prior to the hearing on the judgment creditor's net worth contest setting out (1) the expert, (2) the opinion it is seeking to exclude, and (3) the reasons it is seeking exclusion. *See Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 709 (Tex. 1997). Once the judgment debtor objects to the expert testimony, it is the judgment creditor's burden to respond to each objection and to establish that the testimony is admissible by a preponderance of the evidence. *See Robinson*, 923 S.W.2d at 557.

XII. ORDER ON NET WORTH CONTEST

Following a hearing on the judgment creditor's net worth contest, the trial court must issue an order. TEX. R. APP. P. 24.2(c)(3).

A. Requirements of Order

1. Amount of Net Worth

First, the trial court must state a net worth amount for each judgment debtor to enable each debtor to calculate what amount of the judgment must be superseded to forestall enforcement of the judgment pending appeal. *Id.*

2. Factual Basis for Determination

The trial court must also state with particularity the factual basis for its determination of each judgment debtor's net worth. *Id.* This requirement can be met if the trial court sets out the value of the debtor's assets and liabilities from which it determined the debtor's net worth. *See id.* It would also be helpful for the trial court to provide its determination of the value of each of the judgment debtor's assets and liabilities. *See id.*

B. Findings of Fact and Conclusions of Law

1. Initial Request for Findings

Following the trial court's issuance of an order on the judgment creditor's net worth contest, the judgment debtor may request that the trial court issue findings of fact and conclusions of law if unsatisfied with the trial court's ruling. TEX. R. CIV. P. 296 ("[i]n any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law"). The judgment debtor must file any request within twenty days after the trial court issues its order on the contest. *See id.*

The trial court should file findings within twenty days after the judgment debtor makes a timely request. TEX. R. CIV. P. 297.

2. Winning Party Should Draft Findings

If the judgment creditor succeeds in its challenge of the judgment debtor's net worth and the judgment debtor has requested findings, the creditor should then draft findings of fact and conclusions of law providing with specifity the basis for the trial court's sustaining its challenge. *See Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 254 (Tex.App.–Houston [14th Dist.] 1999, pet. denied). If the proposed findings submitted by the judgment creditor are inadequate, then the judgment debtor needs to file objections to the findings to preserve error on appeal. *See Belcher v. Belcher*, 808 S.W.2d 202, 206 (Tex.App.–El Paso 1991, no writ).

3. Notice of Past Due Findings

If the trial court fails to timely file findings, the judgment debtor will then need to file a notice of past due findings. *See* TEX. R. CIV. P. 297. The filing of this notice then extends the deadline for the trial court to file its findings to forty days from the date of the judgment debtor's original request for findings. *Id.* The judgment debtor must file such a notice to avoid waiving any complaint to the trial court's failure to file findings. *See Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex.App.–Houston [14th Dist.] 2000, no pet.); *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 255 (Tex. 1984).

4. Request for Additional Findings

The judgment debtor may also need to request additional findings if the trial court's original findings are inadequate or omit a controlling issue.

a. Judgment Debtor Must File Request Within Ten Days of Trial Court Filing Initial Findings

Once the trial court issues findings, the judgment debtor may need to request additional findings when the trial court does not adequately detail its findings and the particularized basis for its finding of net worth as to each judgment debtor. *See* TEX. R. CIV. P. 298; *Jamestown Partners v. City of Fort Worth*, 83 S.W.3d 376, 386 (Tex.App.–Fort Worth 2002, pet. denied); *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex.App.–San Antonio 1992, writ dism'd w.o.j.) (holding that the requesting party must submit specific proposed findings). The judgment debtor must make such a request within ten days of the trial court's filing its initial findings. *See id.* Further, the judgment debtor should inform the trial court of any omitted findings, request and submit specific proposed additional findings consistent with the trial court's order, and inform the trial court it does not agree with the requested findings but that the findings are necessary for it to pursue appeal. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 242 (Tex.App.–San Antonio 1992, writ dism'd); *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 254 (Tex.App.–Houston [14th Dist.] 1999, pet. denied).

b. When Are Additional Findings Required?

Additional findings are required on ultimate or controlling issues. *See Kirby v. Chapman*, 917 S.W.2d 902, 909 (Tex.App.–Fort Worth 1996, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 6 (Tex.App–Waco 2002, no pet.); *In the Interest of S.A.W.*, 131 S.W.3d 704, 707 (Tex.App.–Dallas 2004, no pet.). Thus, the trial court need not make additional findings that are unsupported in the record, relate merely to evidentiary matters, or are contrary to other previous findings; if the original findings succinctly relate the ultimate findings of fact and law necessary to apprise the party of adequate information for the preparation of his appeal; or if the requested findings will not result in a different judgment. *See Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (noting that the trial court is not required to make additional findings unsupported in the record, that relate merely to evidentiary matters, or that are contrary to other previous findings); *In re Marriage of Morris*, 12 S.W.3d 877, 886 (Tex.App.–Texarkana 2000, no pet.) (providing that the trial court is not required to file additional findings where the original findings succinctly set out basis for ultimate issues and allow party to prepare for appeal); *Tamez v. Tamez*, 822 S.W.2d 688, 693 (Tex.App.–Corpus Christi 1991, writ denied) (opining that no additional findings are needed if they will not result in a different judgment).

An ultimate fact issue is one that is essential to the right of the action and seeks a fact that would have a direct effect on the judgment. *Limbaugh*, 131 S.W.3d at 6; *S.A.W.*, 131 S.W.3d at 707. An evidentiary issue is one that the trial court may consider in deciding the controlling issue, but that is not a controlling issue itself. *Limbaugh*, 131 S.W.3d at 6; *S.A.W.*, 131 S.W.3d at 707.

c. Showing Harm Due to Failure to File Additional Findings

If the trial court fails to file additional findings, the question on appeal becomes whether the record shows that the trial court's refusal to file additional findings of fact and conclusions of law as requested was reasonably calculated to cause and did cause rendition of an improper judgment. TEX. R. APP. P. 44.1(a). Reversal is required where failure to file additional findings prevents an adequate presentation on appeal. *Id.*; *Huber v. Buder*, 434 S.W.2d 177, 181 (Tex.Civ.App.–Fort Worth 1968, writ ref'd n.r.e.). The issue is whether the circumstances are such that the appellant is forced to guess at the reasons for the trial court's decision. *Goggins v. Leo*, 849 S.W.2d 373, 379 (Tex.App.–Houston [14th Dist.] 1993, no writ). If the judgment debtor does not have the benefit of the trial court's particularized findings under Texas Rule of Appellate Procedure 24.2(c)(3), the judgment debtor will be able to show harm if prevented from properly briefing its issues on appeal.

XIII. SUBSTANTIAL ECONOMIC HARM EXCEPTION

A. Texas Rule of Appellate Procedure 24.2(b)

The trial court must lower the amount of security required by (a) 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 (a) is likely to cause the judgment debtor substantial harm.

TEX. R. APP. P. 24.2(b); *see also* TEX. CIV. PRAC. & REM. CODE § 52.006(c).

B. Showing by Judgment Debtor

The party seeking to have the amount of supersedeas lowered has the burden of proof. *Kajima Intern., Inc.*, 139 S.W.3d 107, 111 (Tex. App.–Corpus Christi 2004, orig. proceeding); *McDill Columbus Corp. v. University Woods Apts.*, 7 S.W.3d 923, 926 (Tex. App.–Texarkana 2000, no pet.).

C. Substantial Economic Harm Standard

1. Judgment Debtor Must Now Show Substantial Economic Harm, Not Irreparable Harm

When requesting that the trial court lower the amount of security, the judgment debtor previously faced the burden of establishing irreparable harm. *See McDill*, 7 S.W.3d at 924-25. Now, the judgment debtor must only show that posting supersedeas in the full amount of the judgment or in the full amount of its net worth will cause substantial economic harm. *See* TEX. R. APP. P. 24.2(b).

a. What Is Irreparable Harm?

Rule 24.2(b) previously allowed the trial court to order a lesser amount of security only upon a finding that posting the required bond, deposit, or security would irreparably harm the judgment debtor, and that posting a bond, deposit, or security in a lesser amount would not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted. *See McDill*, 7 S.W.3d at 924-25. These provisions for reduced and alternate security were adopted to guard against the possibility that a judgment debtor would be denied its right to appeal and to protect the judgment creditor's right to collect on the judgment. *See Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 605 (Tex. 1996).

(1) Showing of Irreparable Harm

In *Isern*, the Texas Supreme Court examined whether the trial court abused its discretion by setting alternate security. *Isern*, 925 S.W.2d at 606. The trial court found that the full supersedeas bond would be approximately $3.1 million; the debtor could only post a bond in the amount of $500,000; the debtor has assets worth $500,000, which included a $150,000 homestead; the debtor would be forced into bankruptcy if alternate security was not allowed; and if the debtor, in fact, filed for bankruptcy, the judgment creditor would be left with a bankrupt debtor and no security for any portion of the judgment. *Id.* Thus, the Supreme Court held that the trial court did not abuse its discretion by finding that the debtor would suffer irreparable harm if alternate security was denied and that the judgment creditor would not suffer substantial harm. *Id.*

(2) No Showing of Irreparable Harm

The Fort Worth Court of Appeals reviewed the sufficiency of a supersedeas bond set by the trial court. *Harvey v. Stanley*, 783 S.W.2d 217, 218 (Tex.App.–Fort Worth 1989, no writ). The judgment debtor sought to have the amount of the supersedeas bond modified because the debtor had no assets and was heavily in debt. *Id.* at 619. The reduced bond had been posted by the debtor's insurance company and closely matched the policy limits. *Id.* The debtor contended he did not have the ability to supersede the full amount of the judgment beyond the policy limits. *Id.*

However, the court of appeals noted that this evidence did not establish that the judgment debtor would be irreparably harmed if required to post supersedeas in full and that the rule did not allow a modified supersedeas simply because the debtor was unable to post the bond–but that the bond must cause irreparable harm. *Id.*

In *McDill*, the Texarkana Court of Appeals reviewed the trial court's refusal to lower the amount of security. *McDill*, 7 S.W.3d at 924. The court of appeals noted that the judgment debtor produced an unaudited financial statement from McDill Columbus Corporation and two witnesses: (1) an independent insurance agent who testified regarding whether the insurance company would issue a supersedeas bond for the debtor after based on financial statement, and (2) a certified public accountant ("CPA"), who testified that after reviewing the statements he believed McDill had no option other than to file for bankruptcy if it was unable to obtain a supersedeas bond. *Id.* at 925.

However, the court of appeals noted that the CPA

did not state that if McDill were required to post bond in the full amount of the judgment that it would be forced into bankruptcy. *Id.* Further, the unaudited financial statements showed that McDill had assets worth $27 million and equity worth $12 million, and none of the witnesses were familiar with the actual market value of the company's assets or the nature of its liabilities. *Id.* at 925-26.

The judgment debtor argued that because it had a low liquidity that it should not be required to post supersedeas for the full amount of the judgment. *Id.* at 926. However, in its analysis, the court concluded that this was not a situation as was present in *Isern* where irreparable harm existed because the judgment exceeded the net worth of the debtor or as in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136-41 (2d Cir. 1986), where the judgment was astronomically large, but that the evidence showed that "at least from a dollar valuation point of view," the judgment debtor had "sufficient assets to cover the amount of the judgment." *Id.* Thus, the court concluded that evidence of low liquidity was only one factor in evaluating irreparable harm and that the judgment debtor had not met its burden of proof to have the amount of security lowered. *Id.*

Under the irreparable harm standard, inability to post bond in the full amount of the judgment did not establish irreparable harm. *See Harvey*, 783 S.W.2d at 219. Instead the evidence had to establish (1) that the debtor would be required to file for bankruptcy if forced to post supersedeas in full or (2) that the judgment exceeded the debtor's net worth. *See McDill*, 7 S.W.3d at 925-26; *Isern*, 925 S.W.2d at 606. Accordingly, under irreparable harm standard, the judgment debtor had a higher burden to meet to have the amount of security lowered.

b. What Is Substantial Economic Harm?

While "substantial harm" is not defined by statute, it is clear that it is something less than "irreparable harm," which is the legal standard used before the statutory amendment. *Ramco Oil*, 171 S.W.3d at 916. In fact, one legal commentator has observed:

> The recent legislative modifications to supersedeas requirements effective as to all cases in which a final judgment is signed on or after September 1, 2003, reflect a shift in concern from that of protecting the judgment creditor's ability to collect the judgment if affirmed on appeal, to protecting the judgment debtor from substantial economic harm by appellate security requirements that may effectively preclude the ability to seek appellate review.

Id. at 916-17 (*citing* Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments On Appeal After House Bill 4*, 46 S. Tex. L. Rev. 1035, 1093 (2005)).

The amendment not only replaced the "irreparable harm standard" for reducing supersedeas security with a "substantial economic harm" standard but also eliminated the requirement that a judgment debtor show "harm" would occur if the supersedeas was not lowered. *Id.* Last, the judgment debtor does not now have to demonstrate that allowing lower security will not substantially decrease the degree to which a judgment creditor's recovery would be secured. *Id.* Consequently, now the court need not consider how lowering the security will affect the judgment creditor. *Id.*

2. <u>Factors Examined in Determining Substantial Economic Harm</u>

In discussing the substantial economic harm standard, the Fourteenth Court of Appeals suggested that the trial court could examine a number of factors affecting a judgment debtor's ability to post bond or other security based on a case-by-case basis. *Id.* The Court of Appeals, in fact, concluded that the primary focus of the examination was the judgment debtor's ability to post supersedeas based on its available assets–not the market value of the company. *Id.*

The Court of Appeals found that the following factors were the sort of inquiries that would reveal whether a judgment debtor was likely to suffer substantial economic harm:

> (1) How much cash or other resources would it take to post a supersedeas bond in the amount in question?;
>
> (2) 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?;
>
> (3) Does the judgment debtor have any other source of funds available?;
>
> (4) Does the judgment debtor have the ability to borrow funds to post the requisite security?;

(5)Does the judgment debtor have unencumbered assets to sell or pledge?;

(6)What economic impact is such a transaction likely to have on the judgment debtor?;

(7) Would requiring the judgment debtor to take certain action likely trigger liquidation or bankruptcy or have other harmful consequences?;

(8) Would the attorney's fees and costs of appealing further drain the judgment debtor's resources?

Id.

3. Impact on Judgment Debtor

Accordingly, the substitution of the substantial economic harm standard for irreparable harm lowers the burden placed on the judgment debtor. *Compare Ramco*, 171 S.W.3d at 917 (setting out factor for trial court to examine in determining substantial economic harm) *with McDill*, 7 S.W.3d at 925-26 *and Isern*, 925 S.W.2d at 606. The judgment debtor no longer must demonstrate lowering the security will not adversely affect the judgment creditor. *Ramco*, 171 S.W.3d at 916-17.

This change memorializes the legislature's stated purpose of the enactment of Texas Civil Practice and Remedies Code section 52.006 and the resulting amendments to Rule 24.2 of the Texas Rules of Appellate Procedure as balancing the interests of the judgment debtor to pursue appeal and the interests of the judgment creditor to collect on the judgment. *See* HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003).

D. Standard of Review

The trial court's "substantial economic harm" determination under Rule 24.2(b) is reviewed by an abuse of discretion standard. *Ramco*, 171 S.W.3d at 909-10 (*citing Isern*, 925 S.W.2d at 606 (stating that trial court had discretion to allow alternate security under former Texas Rule of Appellate Procedure 47 and section 52.002 of the Texas Civil Practice and Remedies Code)).

XIV. INJUNCTION

A. Trial Court Has Power to Prevent Dissipation of Assets

Once the judgment debtor has fully superseded enforcement of the judgment, the trial court still has power to prevent the dissipation or transfer of assets not in the ordinary course of business. Rule 24.2(d) provides as follows:

> 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 in the normal course of business.

TEX. R. APP. P. 24.2(d); *see also* TEX. CIV. PRAC. & REM. CODE § 52.006(e). Accordingly, questions arise regarding what relief the trial court can grant a judgment creditor to prevent the dissipation of assets.

The San Antonio Court of Appeals has concluded that the trial court has jurisdiction to grant a post-judgment injunction even where the judgment debtor has posted a cash deposit securing actual or compensatory damages but has not secured the punitive damages awarded in the judgment, pursuant to Rule 24.2(a)(1) and section 52.006(a) (providing that no security must be posted for punitive damages). *Emeritus Corp. v. Ofczarzak*, __S.W.3d__, 2006 WL 467976, *1, *3 (Tex.App.–San Antonio 2006, no pet.) (involving security for $1.725 million in compensatory damages and leaving unsecured $18 million in punitive damages awarded). The court of appeals reasoned that the legislative history to House Bill 4 revealed that while the Legislature realized the trial court had the authority to enjoin waste or disposal of assets subject to collection, the Legislature still expressly provided the court with the authority to grant an injunction. *Id.* The court also noted that the language of the rule sought to prevent dissipation of all assets that could satisfy the judgment, not simply assets to satisfy the compensatory portion of the judgment. *Id.* Accordingly, the court held that the trial court's injunction authority was not limited when the judgment debtor posted a cash deposit covering the compensatory portion of the judgment, but leaving unsecured the punitive damages awarded. *Id.*

1. Can the Trial Court Order Monthly or Quarterly Financial Statements or Discovery

Can the trial court order the judgment debtor to provide monthly or quarterly statements detailing what assets have been dissipated or transferred and for what purpose? Can the trial court order the judgment debtor to answer discovery on a monthly or quarterly basis to

address dissipation or transfer of assets?

Rule of Civil Procedure 621a provides as follows:

> At any time after rendition of judgment, and so long as said judgment has not been superseded by a supersedeas bond or by order of a proper court and has not become dormant . . ., the successful party may, for the purpose of obtaining information to aid in enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters. Also, at any time after rendition of judgment, either party may, for the purpose of obtaining information relevant to motions allowed by Texas Rule of Appellate Procedure 47[4] and 49 initiate and maintain in the trial court in the same suit in which judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters.

TEX. R. CIV. P. 621a; *see also* TEX. R. APP. P. 24.1(f) (providing "[e]nforcement of the judgment must be suspended if the judgment is superseded"). Thus, all post-judgment enforcement discovery is foreclosed once the judgment is superseded. *See id.* Further, net worth discovery is allowed in conjunction with the judgment creditor's net worth challenge under Texas Rule of Appellate Procedure 24.2(c)(2). *Id.*, *see also* TEX. R. APP. P. 24.2(c)(2). However, neither Rule 621a of the Texas Rules of Civil Procedure nor Rule 24 of the Texas Rules of Appellate Procedure specifically allow a judgment creditor to demand discovery in conjunction with an injunction obtained under Rule 24.2(d) to enjoin the judgment debtor from dissipating or transferring assets. *See* TEX. R. CIV. P. 621a; TEX. R. APP. P. 24.2(d).

Requiring the judgment debtor to endure such an onerous task as responding to discovery on a monthly or even quarterly basis and providing detailed financial information concerning the dissipation and transfer of its assets, including those transactions undertaken in the ordinary course of business, vitiates the stated intent of the legislature's amendments. *See* Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1448-51 (April 15, 2003). The legislature intended to balance the interests of the judgment debtor in pursuing an appeal and the judgment creditor's rights in collecting on the judgment, not enhance the burden of the judgment debtor in seeking appellate relief. *See id.* Thus, the judgment debtor should not have to waste time and resources in undertaking such an onerous task when the judgment has been fully superseded. *See* TEX. R. APP. P. 24.2(d); *but see Emeritus Corp.*, 2006 WL 467976, at *3-4 (concluding that the trial court did not abuse its discretion by granting a post-judgment injunction preventing the judgment debtor from dissipating or wasting assets and allowing discovery regarding same).

2. Does Requiring a Judgment Debtor to Answer Discovery or Provide Financial Information Following Suspension of the Judgment Constitute an Interference with the Judgment Debtor's Ordinary Business Affairs?

Does requiring the judgment debtor to provide detailed financial information or respond to discovery constitute an interference with the judgment debtor's use, transfer, conveyance, or dissipation in the normal course of business? What about the expense the debtor must incur in preparing such statements and responses?

Requiring a judgment debtor to respond to discovery regarding the dissipation and transfer of its assets on a monthly or quarterly basis constitutes interference with the judgment debtors's use, transfer, conveyance, and dissipation of its assets **in the ordinary course of business**. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(d). During the legislative process, a representative expressed concern about whether giving the trial court unfettered discretion to grant the judgment creditor an injunction against the judgment debtor would swallow the intent of the amendments. *See* Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 2013 (May 7, 2003). The legislature added a provision disallowing the trial court from interfering in the ordinary course of the judgment debtor's business. *See id.*; TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(d). Thus, requiring disclosure of transfers in the ordinary course of a judgment debtor's business either through production of financial statements or responses to discovery violates the clear intent of the legislature in allowing alternate security and easier appellate access for judgment debtors..

XV. MOTION TO REVIEW IN THE COURT OF APPEALS

A. Texas Rule of Appellate Procedure 24.4

(a) Motions; review. On a party's motion to

[4] Texas Rules of Appellate Procedure 47 and 49 are now collectively Texas Rule of Appellate Procedure 24.

the appellate court, that court may review:

1. the sufficiency of the excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);

B. the sureties on any bond;

C. the type of security;

D. the determination whether to permit suspension of enforcement; and

E. the trial court's exercise of discretion under 24.3(a).

(b) Grounds of review. Review may be based both on conditions as they existed at the time the trial court signed an order and on changes in those conditions afterward.

(c) Temporary orders. The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) Action by the appellate court. The motion must be heard at the earliest practicable time. The appellate court may require that the amount of the bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court for entry of findings of fact or for the taking of evidence.

(e) Effect of ruling. If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

TEX. R. APP. P. 24.4.

(2) Method of Seeking Review

1. Motion

Thus, if the judgment debtor is unsatisfied with the trial court's finding of net worth under Texas Rule of Appellate Procedure 24.2(c)(3) or the trial court's injunction under Texas Rule of Appellate Procedure 24.2(d), the judgment debtor can file a Rule 24.4 Motion in the court of appeals seeking review of the trial court's determination or injunction. TEX. R. APP. P. 24.4(a); *see also City of Fort Worth v. Johnson*, 71 S.W.3d 470, 471 (Tex.App.–Waco 2002, no pet.) (*citing* TEX. R. APP. P. 24.4(d) (providing that seeking review by a Rule 24 Motion represents a more efficient and expeditious manner of review because the appellate court is able to hear the motion at the earliest practical time)); *Emeritus Corp.*, 2006 WL 467976 at *2 (finding that the court had jurisdiction to review a post-judgment injunction under Rule 24.4 because the injunction was a "type of security" in this context).

2. Immediate Consideration

In conjunction with its motion, the judgment debtor may also request that the court of appeals immediately consider the merits of the motion and can file a motion for emergency relief requesting that the court of appeals stay any discovery ordered by the trial court or execution on the judgment pending the court's review of the trial court's net worth determination. *See id.* 24.4(c), (d).

3. Request for Remand

Further, if the trial court fails to state a net worth amount for each individual judgment debtor and/or to state with particularity the factual basis for its determination of each judgment debtor's net worth, the judgment debtor should request that the court of appeals remand the proceeding back to the trial court for entry of findings. *See id.* 24.4(d). The judgment debtor should also request permission to re-brief its issues in the event that the court of appeals decides to remand for entry of findings. *See id.*

(3) Standard of Review of Rule 24.4 Motion

The trial court's determination of the amount of security under Rule 24.4 of the Texas Rules of Appellate Procedure is reviewed under an abuse of discretion standard. *Ramco*, 171 S.W.3d at 909 (*citing In re Kajima Intern., Inc.*, 139 S.W.3d 107, 112 (Tex. App.–Corpus Christi 2004, orig. proceeding)).

Under section 52.006, the trial court's discretion is limited by the lesser of fifty percent of the judgment debtor's net worth or $25 million or an amount that is likely to cause the judgment debtor substantial economic harm. TEX. CIV. PRAC. & REM. CODE § 52.006(b), (c); *Bocquet v. Herring,* 972 S.W.2d 19, 20-21 (Tex. 1998). The trial court abuses its discretion if the evidence is legally or factually insufficient to support its findings under section 52.006(b) or (c). *Ramco,* 171 S.W.3d at 910 *(citing Bocquet*, 972 S.W.2d at 20-21; *Bass v. Walker*, 99 S.W.3d 877, 883 (Tex.App.–Houston [14th Dist.] 2003, pet. denied) (although court of appeals reviews sanctions under abuse-of-discretion standard, if there is legal or factually insufficient evidence to support the trial court's fact finding under the relevant legal standard, then the trial court abused its discretion); *Hunt v. Baldwin*, 68 S.W.3d 117, 135 n. 8 (Tex.App.–Houston [14th Dist.] 2001, no pet.)).

Testimony from interested witnesses may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct, and positive, and there are no circumstances tending to discredit or impeach it. *Ramco*, 171 S.W.3d at 911 (*citing Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989); *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) (stating that the factfinder cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted)).

In regard to the trial court's grant of a post-judgment injunction to prevent dissipation and waste of assets, the San Antonio Court of Appeals has concluded that the "applicable standard is a factual matter requiring the trial court to determine whether the judgment debtor is likely to dissipate or transfer its assets to avoid satisfaction of the judgment. The trial court abuses its discretion in ordering a post-judgment injunction if the only reasonable decision that could be drawn from the evidence is that the judgment debtor would not dissipate or transfer its assets." *Emeritus Corp.*, 2006 WL 467976 at *4 (concluding that the trial court did not abuse its discretion in granting a post-judgment injunction against dissipation of assets where the same judge that presided over the trial entered the injunction and was well versed in the judgment debtor's corporate structure and procedural activities).

(4) What Actions Can the Court of Appeals Take?

In addition to remanding the trial court for entry of findings or for the taking of evidence, the court of appeals is given authority to require that the amount of the judgment debtor's deposit be either increased or decreased, that another deposit be provided and approved by the clerk, or that other changes be made to the trial court's order under Rule 24.2(c)(3). TEX. R. APP. P. 24.4(d).

If the court orders that additional security be posted, the judgment debtor will have the benefit of suspension of the judgment for an additional twenty days so that it may comply with the court of appeals' order. *See id.* 24.4(e).

XVI. APPEAL TO SUPREME COURT

If the judgment debtor is unsatisfied with the court of appeals' ruling on a Rule 24.4 Motion, the debtor can appeal the determination to the Texas Supreme Court. *See* TEX. R. APP. P. 24.4; *see also* TEX. R. APP. P. 3.1 (defining "appellate court" to be the court of appeals, Court of Criminal Appeals, or Supreme Court).

A. The Judgment Debtor Must Establish Jurisdiction

If pursuing review in the Texas Supreme Court, the judgment debtor will need to establish that the Court has jurisdiction. The judgment debtor should first provide that the Court has jurisdiction to review its motion under section 52.006 of the Texas Civil Practice and Remedies Code and Rule 24.4 of the Texas Rules of Appellate Procedure. TEX. CIV. PRAC. & REM. CODE § 52.006(d); TEX. R. APP. P. 24.4(a).

The judgment debtor should also provide that the Court has jurisdiction under the Texas Constitution and the Texas Government Code. Section 22.001 of the Government Code provides as follows:

> **(a)** The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:
>
> (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
>
> (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme

court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

TEX. GOV'T CODE ANN. §22.001 (Vernon 2004). The most common indicia of jurisdiction in a Rule 24.4 Motion proceeding will involve situations (1) where the court of appeals has reviewed the judgment debtor's Rule 24.4 Motion and the justices of the court of appeals disagreed on a question of law material to the decision, (2) the construction or validity of section 52.006 and Rule 24.2 is at issue, and (3) an error of law committed by the court of appeals is of such importance to the jurisprudence of the state that it requires correction. *See id.*§ 22.001(a)(1), (3), (6). However, until the Supreme Court considers its jurisdiction, in addition to filing a Rule 24.4 Motion, the judgment debtor may consider filing contemporaneously a petition for writ of mandamus raising the same issues. *See Swinney v. Tenth Dist. Court of Appeals*, 749 S.W.2d 50 (Tex. 1988) (under former rule, presenting supersedeas issue to the Texas Supreme Court through an original proceeding); *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996).

B. What Actions May the Supreme Court Take?

The Supreme Court has the power to review both the trial court determination's of net worth under Texas Rule of Appellate Procedure 24.2(c)(3) and the court of appeals' decision after reviewing the judgment debtor's Rule 24.4 Motion under Texas Rule of Appellate Procedure 24.4(d). *See* TEX. R. APP. P. 24.4(d); TEX. GOV'T CODE ANN. §22.001(1), (3).

The judgment debtor may also request emergency temporary relief in the Supreme Court seeking to stay all proceedings including execution on the judgment and responses to discovery. *See* TEX. R. APP. P. 24.4(c) (giving the appellate court authority to grant any temporary orders to preserve rights of the parties).

XVII. ETHICAL CONSIDERATIONS IN POSTING SUPERSEDEAS BASED ON THE NET WORTH OF THE JUDGMENT DEBTOR

A. What Must the Judgment Debtor Post As Supersedeas When It Has Zero or Negative Net Worth and Does it Matter if the Judgment Debtor Has Insurance Coverage?

A problematic situation arises when the judgment debtor has a zero or negative net worth. Section 52.006 and Rule 24.2 state that a judgment debtor must supersede the judgment in an amount **not to exceed fifty percent of its net worth**. TEX. CIV. PRAC. & REM. CODE § 52.006(b)(1); TEX. R. APP. P. 24.2(a)(1)(A). Thus, under section 52.006 and Rule 24.2 when the judgment debtor has a zero or negative net worth, the judgment debtor can presumably pursue appeal **without posting any security.**

1. Testimony in Legislature and Supreme Court Rules Committee

There was some testimony before the Senate expressing concern about the new supersedeas requirements:

> [T]hat if you have an insolvent defendant, someone who's already defaulted on a loan, in all likelihood is gonna cause some substantial economic harm to try to supersede the judgment. They'll be able to get the supersedeas reduced to virtually nothing and forestall collection efforts by the banks on collecting the debt. This will only lead to increased cost of lending money, as bank security dwindles, the, it come, it becomes harder for them, they have to wait an extra two years to even get a ticket in line to try to execute on the, the judgment debtor's assets.

Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1459 (April 15, 2003).

The Supreme Court Rules Committee also recognized that this particular problem could arise:

> You know, there's a problem that's going to come up under here that I don't think is generally appreciated. We are going to have a lot of people with no net worth who are saying "I don't owe a supersedeas bond."

TEX. SUP. CT. ADVISORY COM. MTG. 9944 (Aug. 21, 2003) (afternoon session). However, no solution to the problem arising when a judgment debtor has zero or negative net worth was addressed in either section 52.006 or Rule 24.2. *See id.*

Moreover, testimony before the legislature showed that some attorneys did not believe insolvency would be an issue where the judgment debtor had insurance coverage. In addressing the irreparable harm standard under the previous enactment, Dan Byrne provided as follows:

> Another thing that struck me as puzzling about, about the bill is it seems to be designed to prevent irreparable harm to defendants who are gonna be out outta business, and independently, the issue of whether we have an adequate current system in place for that. In, in, in many cases, even in the commercial field where, where I practice, you've got an insurance policy out there that is providing coverage to, to the, the business involved in the dispute. The business may be insolvent. I've got a case right now where my, my client has a negative net worth of, of millions of dollars, but has an insurance policy behind it, and the reason the case continues to proceed is, is because of insurance and I, I was struck by the fact that in evaluating how big the bond should be, the availability of, of insurance coverage to ultimately pay the judgment was completely ignored in the statutory framework.

Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1467 (April 15, 2003). When a judgment debtor has a zero or negative net worth, Byrne cautioned that justice could be delayed by the zero or minimal supersedeas requirements in these cases, resulting in harm to plaintiffs. *Id.* at 1468.

Later, Byrne explained the impact of the judgment debtor's insurance coverage:

> As I understand the purpose of, of this, these modification of rules relating to supersedeas bonds, it's primarily designed to protect, to preserve access to the appellate courts for unsuccessful parties and judgment debtors, in, in litigation, and the concern has been that the financial hardship associated with posting a 100 percent supersedeas bond sometimes ha–has the effect of depriving parties of meaningful access. In much of my work, and I think much of work, real, real world litigation that goes on out there, you know, insurance is a big factor in, in fashioning appe–supersedeas bond relief. The statute now focuses entirely on the net worth of the judgment debtor. A lot of times insolvent judgment debtors will have plenty of insurance and, and there will be no issue about, about that.

Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1959 (May 7, 2003).

2. Intent of the Legislature in Lowering Bonding Requirements

One commentator has characterized House Bill 4 as reflecting a new balance between the interests of the judgment debtor and the judgment creditor:

> The legislature made sweeping changes to

> Chapter 52, 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.

Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments On Appeal After House Bill 4*, 46 S. Tex. L. Rev. 1038.

Indeed, the legislative history of House Bill 4, the enactment of section 52.006, and the corresponding amendments to Texas Rule of Appellate Procedure 24.2 evidence an intent by the legislature to strike a balance between the interests of a judgment debtor and judgment creditor due to the addition of alternate security allowing the judgment debtor to post supersedeas in an amount not exceeding the lesser of fifty percent of its net worth or $25 million and a provision giving the trial court authority to nevertheless prevent the fraudulent transfer of the judgment debtor's assets while appeal is pending. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2; Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199-201 (February 26, 2003).

Thus, the question arises whether a judgment debtor, who has insurance coverage, but nevertheless proceeds to post alternate security under section 52.006 and Rule 24.2 in an amount not exceeding fifty percent of its net worth when it has a negative or zero net worth is thwarting the intent of the legislature in enacting House Bill 4. If the legislature intended to secure easier appellate access for judgment debtors who would be forced into bankruptcy if required to bond the entire judgment, a judgment debtor with an insurance policy covering the judgment would not seem to fall under the purview of the legislature's intended purpose for use of alternate security.

B. Are there Ethical Considerations When a Insurer Refuses to Post a Bond?

Ethical considerations can also be implicated when a judgment debtor, with insurance coverage but who has a negative, zero, or low net worth, wants the insurance company to post a bond to supersede the entire judgment, but the insurance company refuses to do so, instead requiring the judgment debtor to proceed on a net worth determination. Is it reasonable for the insurer to request the insured go through the net worth proceeding to obtain a determination and lowered bond amount?

1. <u>Possible Bad Faith Claim Against Insurer</u>

If an insurer refuses to post a supersedeas bond to suspend enforcement of the judgment and the judgment debtor incurs further liability or damages during post-judgment proceedings, the insured potentially has a bad faith claim against the insurer for any damages suffered as a result of the insurer's failure to post supersedeas. It should be emphasized that there are many variables, including the duty to post supersedeas that controls this issue.

a. Elements of a Bad Faith Claim

For an insured to have a claim for bad faith against an insurer, there must have first been a contract between the insured and insurer that created a duty of good faith and fair dealing. *See Universe Life Ins v. Giles*, 950 S.W2d 48, 50-51 (Tex. 1997). An insurer breaches its duty of good faith and fair dealing by failing to settle with the insured by refusing to pay a claim or delaying payment of a claim or by cancelling an insured's policy without reasonable basis. *See Giles*, 950 S.W.2d at 56; *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex. 1994); *see also Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988) (stating that when an insured enters into an insurance contract with the insurer, there is also a common law duty for the insurer to deal fairly and in good faith with the insured)). Last, any damage suffered by the insured must have been proximately caused by the insurer's breach. *See Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 (Tex. 1987).

b. What Damages Can the Insured Recover?

The judgment debtor must prove that the damages it suffered were different than the benefits owed under the insurance contract with the insurer because a bad faith claim sounds in tort, not contract. *Aranda*, 748 S.W.2d at 214. Further, the judgment debtor can only sue for actual damages, including economic injury or personal injury. *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 958 (Tex.App.–Corpus Christi 1998, no pet.). Economic and personal injury damages include damages for mental anguish, loss of credit reputation or increased business costs, and damages for loss of policy benefits. *See Giles*, 950 S.W.2d at 54 (providing that to recover for mental anguish damages the judgment debtor must introduce direct evidence of the nature, duration, and severity of its mental anguish to establish a substantial disruption in its daily routine); *St. Paul Lines Co. v. Dal-Worth Tank Co.*,

974 S.W.2d 51, 53 (Tex. 1998) (stating that the judgment debtor must suffer actual damage and mere inability to obtain a loan is insufficient, absent a showing that such inability resulted in injury and proof of the amount of that injury); *Twin City Fire Ins. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995).

If the judgment debtor recovers damages independent of its loss of policy benefits, it can then seek exemplary damages if the insurer's conduct was fraudulent, malicious, or grossly negligent. *Giles*, 950 S.W.2d at 54. The debtor can also recover pre and post-judgment interest and court costs but may recover attorney's fees only if allowed by statute, contract, or equity. *Holland v. Wal-Mart*, 1 S.W.3d 91, 95 (Tex. 1999) (allowing recovery of fees by statute or contract); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974) (allowing recovery of fees by equity).

c. Any Defenses for Insurer?

However, the insurer does have defenses against a bad faith claim by the judgment debtor. For example, the insurer may contend that the judgment debtor's own acts or omissions caused or contributed to the injury even though Texas has not recognized the doctrine of comparative bad faith. For example, the judgment debtor might have contributed to the imposition of sanctions due to filing a misleading net worth affidavit that either omitted or mis-valued assets and liabilities.

Further, the insurer may argue that it had a reasonable basis for denying or delaying the posting of supersedeas. *See Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 194 (Tex. 1998) (concluding that "when medical evidence is conflicting, liability is not reasonably clear, and it cannot be said that the insurer had no reasonable basis for denying the claim unless the medical evidence on which the insurer based its denial is unreliable and the insurer knew or should have known that to be the case"); *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (stating that there is no bad faith liability when benefits to which the claimant is not entitled are denied). For instance, the insurer may be denying coverage of the judgment debtor's claim.

2. Breach of Contract Action Against Insurer

If an insurer refuses to post a supersedeas bond to suspend enforcement of the judgment and was required to do so by contract, the judgment debtor may also have a claim against the insurer for breach of contract if the contract provided that the insurer would post bond to supersede enforcement of a judgment rendered against the judgment debtor.

a. Elements of Breach of Contract

The judgment debtor must first prove there was an enforceable contract and that the insurer breached that contract. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex.App.–Houston [1st Dist.] 1997, no writ); *Southwell v. University of the Incarnate Word*, 974 S.W.2d 351, 354-55 (Tex.App.–San Antonio 1998, pet. denied).

An insurer breaches the insurance contract where it refuses to perform a contractual obligation. *Tennessee Gas Pipeline Co. v. Lenape Res. Corp.*, 870 S.W.2d 286, 302 (Tex.App.–San Antonio 1993), *rev'd in part on other grounds*, 925 S.W.2d 565 (Tex. 1996) (*citing Townewest Homeowners Ass'n, Inc. v. Warner Communication Inc.*, 826 S.W.2d 638, 640 (Tex.App.---Houston [14th Dist.] 1992, no writ)).

The judgment debtor must also show that the insurer's breach caused its injury. *Southwell*, 974 S.W.2d at 354-55. The debtor can recover nominal damages, actual damages, and liquidated damages. *See Hauglum v. Durst*, 769 S.W.2d 646, 651 (Tex.App.–Corpus Christi 1989, no writ) (allowing recovery of nominal damages); *Mead v. Johnson Group*, 615 S.W.2d 685, 687 (Tex. 1981) (providing that actual damages may be recovered when the loss is the natural, probable, and foreseeable consequence of the insurer's conduct); *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 810 (Tex.App.–Dallas 1999, no pet.) (concluding that a liquidated damages clause could be enforced where the harm caused by the breach is incapable of being estimated or is difficult to estimate at the time of entry into the agreement, and the amount of liquidated damages called for is a reasonable forecast of just compensation). The judgment debtor can also collect pre and post-judgment interest, court costs, and attorney fees by statute or contract. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (allowing recovery of attorney's fees in a contract action).

3. Miscellaneous Claims

a. Claim under the Insurance Code

The judgment debtor may also have a claim under Chapter 541 of the Insurance Code for unfair or deceptive insurance practices. *Great Am. Ins. Co. v. North Austin MUD*, 908 S.W.2d 415, 420 (Tex. 1995).
The judgment debtor must prove that the insurer violated

Chapter 541, Texas Business and Commerce Code section 17.46(b), or a tie-in provision of the Texas Insurance Code.

Under Chapter 541, the insurer can be liable for unfair competition, false advertising, misrepresentations about insurance policies, and unfair settlement practices. *See* TEX. INS. CODE §§ 541.051 (prohibiting specific misrepresentation regarding the terms of any policy or the benefits and advantages promised by any policy); 541.061 (prohibiting misrepresentations regarding material facts as to insurance policies; 541.060 (prohibiting unfair settlements practices).

b. Claim under the Deceptive Trade Practices Act

Section 17.46(d) of the Deceptive Trade Practices Act prohibits a laundry list of false, misleading, and deceptive acts and practices. *See* TEX. BUS. & COM. CODE § 17.46(d). To pursue relief under section 17.46, the judgment debtor must show that the insurer committed one of the prohibited acts and that it detrimentally relied on that act. TEX. INS. CODE § 541.151.

c. Recovery of Damages

Under these claims, the judgment debtor can recover for actual damages, including damages for economic injury and personal injury and may be entitled to equitable relief. TEX. INS. CODE § 541.152(a)(1), (a)(2). The debtor may also recover for pre and post-judgment interest, court costs, and attorney fees. TEX. INS. CODE § 541.152.

C. Conflict of Interest for Attorney Representing Both Insured and Insurer

A conflict may arise where the insurer requires the judgment debtor to submit to the net worth procedure of Chapter 52 and Rule 24, exposing the insured to financial disclosure and court proceedings regarding the financial condition of the insured for purposes of lowering the amount of the bond required to suspend judgment enforcement. The insurer's benefit is that it will tie up less collateral with a reduced bond amount, will increase reserves available for other claims, potentially allowing more issues to be reached on appeal. The benefit must be weighed against risk to the insured of protracted ancillary ligation regarding its financial condition.

The Eastland Court of Appeals has described the relationship created by representation of the insured at the behest of the insurer as follows:

> Insureds purchase liability insurance to protect against the risk of defending a lawsuit and to protect against the risk of having to pay a money judgment as a result of that lawsuit. The defense of a lawsuit covered by liability insurance involves a "tripartite" relationship consisting of the insured, the insurer, and the defense counsel. Because this tripartite relationship may involve conflicts, there has been an ongoing national debate concerning the ethical obligations of defense counsel and the role of the insurer in providing defense counsel.

American Home Assur. Co., Inc. v. Unauthorized Practice of Law Committee, 121 S.W.3d 831, 833-34 (Tex.App.–Eastland 2003, rev. granted). The court cited the following as examples of conflicts that could arise between an insured and insurer:

> For example, there may be disagreements between the insurer and the insured over conduct of the litigation due to (1) the insured's concern over the side effects of litigation, such as publicity and reputation, or about a personal or business relationship with the plaintiff; (2) the preference of the insured for a more expensive effort than the insurer is willing to make; and (3) the possibility that the insurer has some additional interest in the outcome of a particular lawsuit, such as its desire to obtain a precedential ruling that will benefit the insurer in other cases.

Id. at 834 n. 3 (*citing* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 266 (1995)).

1. Insurer Retains Attorney for Insured

An insurance company retains an attorney for the insured, controls the insured's legal defense, decides whether the insured's claim should be settled, and pays the judgment or any settlement offer as to policy limits. *Id.* at 838. However, the insured is the attorney's **primary client**. *Id.* Accordingly, the attorney has a duty to protect the interest of the insured if those interests would be compromised by the insurer's instructions so that the attorney must resolve ethical concerns in favor of the insured. *Id.*

Thus, where the insurer instructs the attorney to post a cash deposit or supersedeas in an amount not to exceed fifty percent of the judgment debtor's net worth and

doing so instead of posting a bond in the full amount would compromise the judgment debtor's interests, a conflict of interest arises between the attorney's representation of the interests of the insurance company and the judgment debtor as the insured. *See id.* Therefore, because the attorney owes the insured an unqualified duty of loyalty, the attorney must immediately inform the judgment debtor of any conflict between the insurer's interests and the judgment debtor's interests. *See Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973) (*citing Automobile Underwriters' Ins. Co. v. Long*, 63 S.W.2d 356 (Tex. Comm. App. 1933).

XVIII. CONCLUSION

In conclusion, attorneys may encounter several pitfalls under Texas Civil Practice and Remedies Code section 52.006 and Texas Rule of Appellate Procedure 24.2 when superseding money judgments. Many of these pitfalls arise due to the legislature's failure to anticipate problems with alternate security such as a judgment debtor with very low, a zero or negative net worth.

Other pitfalls arise from the difficulty faced in defining terms utilized in the statute and rule such as "net worth." Only time will tell whether the courts will formulate a working definition of net worth that can be used by judgment debtors in calculating fifty percent of their net worth suitable for both individual and business judgment debtors, United States and non-United States debtors, and judgment debtors using different accounting methods. The courts will also be faced with answering the question of what assets and liabilities a judgment debtor's net worth will encompass, such as insurance coverage and the judgment.

XIX. INSURER'S RIGHTS TO INTERVENE

Any party may intervene by filing a pleading, subject to being struck by the court for sufficient cause on the motion of any party. TEX. R. CIV. P. 60. An intervenor is not required to secure the court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike. It is an abuse of discretion to strike a plea in intervention if:

(1) the intervenor could have brought some or all of the same action in its own name, or, if the action had been brought against it, it could defeat some or all of the recovery,
(2) the intervention will not complicate the case by an excessive multiplication of the issues, and
(3) the intervention is almost essential to effectively protect the intervenor's interest. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652,657 (Tex. 1990).

There have been several situations where insurers intervened both at the trial court level and the appellate level.