

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 2250

INTRODUCER: Judiciary Committee and Senator Webster

SUBJECT: Supersedeas Bond

DATE: April 27, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Where a money judgment is entered by a court, the prevailing party¹ may enforce the judgment even though an appeal is pending. In order to prevent collection on that judgment during the appeal process, an appealing party² may post a supersedeas bond. A supersedeas bond also protects a prevailing party by insuring that a judgment can be enforced against the nonprevailing party.

The bill places an upper limit on a supersedeas bond at \$50 million dollars per appellant regardless of the type of appeal or case except for certified class actions subject to s. 768.733, F.S. The \$50-million figure shall be adjusted annually to reflect changes in the Consumer Price Index. A party seeking a stay of execution pending review of a judgment may move the court to reduce the amount, which the court may grant, unless the appellant has an insurance or indemnification policy applicable to the case.

If bond is posted for less than the amount for an automatic stay under the Florida Rules of Appellate Procedure, the appellee may engage in certain limited discovery. If the court determines that an appellant has dissipated or diverted assets or is in the process of doing so, the court may take certain actions to protect the judgment.

This bill creates section 768.734, Florida Statutes:

¹ On appeal the prevailing party is referred to as the appellee.

² On appeal the appealing party is referred to as the appellant.

II. Present Situation:

When a money judgment is entered, a nonprevailing party has a couple of options available. First, the nonprevailing party must decide whether or not to appeal. If an appeal is to be taken, then the issue of a bond is to be considered. If no bond is posted, the nonprevailing party (appellant) risks the possibility that the prevailing party (appellee) may begin collecting on the judgment while the appeal is ongoing.³ Furthermore, “the appellant who does not post a bond runs the risk that” if there is a “reversal the appellee may no longer have the money and may be judgment proof.”⁴

An appellant can avoid this situation by posting a bond. A sufficient bond entitles the appellant to an automatic stay of the judgment while the appellate court rules on the matter.⁵ A sufficient bond, or a supersedeas bond, is an appellant’s bond to stay the execution on a judgment during the appeal. Such a bond is obtained from a surety company authorized to do business in the state.⁶ The amount of the supersedeas bond, set by the Florida Rules of Appellate Procedure and automatically accepted by the clerk of the court, is a combination of the final judgment plus two years of interest.⁷ However, the trial court retains jurisdiction to determine the sufficiency of any bond.⁸ The mandatory conditions of a bond must include a “condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed.”⁹ The purpose behind a supersedeas bond requirement is that it will protect an appellee from the possibility that a judgment cannot be enforced because the defeated party has become insolvent. In other words, “[t]he effect of perfecting a supersedeas [bond] is that it ‘stays further [collection] proceedings, but does not interfere with what has already been done.’”¹⁰ The following excerpt from “*Just what is a civil supersedeas bond and do I need one?*”¹¹ provides a short primer on supersedeas bonds.

Supersedeas bonds are issued by a surety company authorized to do business in the State of Florida. Each circuit maintains a list of approved bonding companies. An insurance broker or surety underwriter is used to procure the bond. Almost all surety companies which issue supersedeas bonds require that security be given to protect them in the event the judgment debtor is unable to pay the sum due if the judgment is affirmed. A bond may be “fully collateralized” or “not fully collateralized.” A “fully collateralized” bond usually means one that is secured by money, government securities, or other type of securities that can be immediately

³ A stay pending review may be essential to effective relief on appeal, yet one is not required for appellate review. *Freedom Insurors, Inc. v. M.D. Moody & Sons, Inc.*, 869 So. 2d 1283, 1285 (Fla. 4th DCA 2004) (quoting *Thalheim v. Camp Phosphate Co.*, 37 So. 523, 525 (1904)).

⁴ Raymond T. Elligett, Jr. & John M. Scheb, *Appellate Stay and Bonds*, 75 Fla. B.J. 33 (May 2001).

⁵ Florida Rules of Appellate Procedure 9.310(a) provides: “[a] stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.”

⁶ Rule 9.310(c)(1), Fla. R. App. P. In the absence of a bond, cash may be deposited in the circuit court clerk’s office.

⁷ Rule 9.310(b)(1), Fla. R. App. P.

⁸ *Id.*

⁹ Rule 9.310(c)(2), Fla. R. App. P.

¹⁰ *Freedom Insurors, Inc.*, 869 So. 2d at 1285.

¹¹ Angela C. Flowers, *Just what is a civil supersedeas bond and do I need one?*, The Record, Florida Bar Journal: Appellate Practice Section, Fall 1999.

converted into cash. The premium for a “not fully collateralized” bond will be higher to account for the absence of liquid assets to back the bond. A large corporate judgment debtor or insurance company may be able to obtain a bond based upon its financial statement alone. An individual or small company will usually be required to post collateral for the bond. . . .

The bond amount is a combination of the final judgment amount plus two years of interest at the statutory rate. Section 55.03 (1), Fla. Stat., requires the state comptroller to set the statutory rate of interest payable on judgments each year on December 1¹². . . . By statute, the “interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid.”

III. Effect of Proposed Changes:

In any civil action, under any legal theory, granting any type of relief, regardless of the amount of the judgment, the amount of a supersedeas bond necessary to stay execution of a judgment during the appeals or discretionary reviews may not exceed \$50 million dollars for each appellant, except for certified class actions subject to s. 768.733, F.S. A party seeking a stay of execution pending review of a judgment may move the court to reduce the bond amount. The court, in the interest of justice and for good cause shown, may reduce the bond amount or may set other conditions for the stay with or without a bond. The court may not reduce the bond if the appellant has an insurance or indemnification policy applicable to the case.

If bond is posted for less than the amount for an automatic stay under the Florida Rules of Appellate Procedure, the appellee may engage in limited discovery for the purpose of determining whether the appellant has dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so. If the court determines that an appellant has dissipated or diverted assets or is in the process of doing so, the court may enter orders necessary to protect the appellee, require the appellant to post a supersedeas bond in an amount up to the amount that would be required for an automatic stay pursuant to Rule 9.310(b)(1), Florida Rules of Appellate Procedure, and impose other remedies and sanctions as the court deems appropriate.

The bill provides an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹² The interest rate established for calendar year 2006 has been set at 9 percent per annum or .0002466 per day. Florida Department of Financial Services, Statutory Interest Rates Pursuant to s. 55.03, Florida Statutes, <http://www.fldfs.com/aadir/interest.htm> (last visited Apr. 22, 2006).

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Exclusive Rulemaking/Separation of Powers

This bill might raise an exclusive rulemaking/separation of powers issue. Supersedeas bonds are requirements of the Florida Rules of Appellate Procedure.¹³ Those rules of procedure are established by the Florida Supreme Court. The Legislature has the authority to promulgate substantive laws, whereas matters of practice and procedure in all state courts are the exclusive domain of the Florida Supreme Court.¹⁴ The Florida Supreme Court has defined the terms as follows:

Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions.¹⁵

“The judiciary and legislature must work together to give effect to laws that combine substantive and procedural provisions in such a manner that neither branch encroaches on the other’s constitutional powers.”¹⁶

This bill could raise a constitutional concern if the limits imposed on supersedeas bonds were considered a procedural rather than a substantive law. It should be noted that the Legislature has imposed other limitations on supersedeas bonds. Section 768.733, F.S., which became effective in 2000, imposes a limitation of \$100 million dollars on such bonds in class actions. However, this statute has not been challenged.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce the amount of fees collected by bonding companies for providing large supersedeas bonds to appealing parties. Furthermore, the party seeking to post a supersedeas bond will be able to procure such a bond at a reduced rate.

¹³ Rule 9.310, Fla. R. App. P.

¹⁴ *Allen v. Butterworth*, 756 So. 2d 52, 59 (2000).

¹⁵ *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) (citing *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975)).

¹⁶ 10A Fla. Jur 2d, Constitutional Law, s. 197.

C. Government Sector Impact:

In cases in which verdicts over \$50 million are awarded, it may be substantially less expensive to appeal the judgment. This may increase the amount of appellate litigation. However, in those same judgments, the prevailing party may be less able to enforce the judgment above the supersedeas bond due to the insolvency of the defeated party.

There may be a minimal but unknown fiscal impact on state government. The courts would be required to hold additional proceedings regarding whether an appellant is intentionally dissipating or diverting assets necessitating an appropriate response by the court.

VI. Technical Deficiencies:

None.

VII. Related Issues:**Chapter Placement**

The bill places this new language in s. 768.734, which is in ch. 768, F.S., dealing with negligence. The bill places limitations on supersedeas bonds for all civil actions brought under any legal theory, with the exception of certified class actions subject to s. 768.733, F.S. Civil actions affected by this bill would include, for example, contract claims, anti-trust actions, and claims under Florida's Racketeering Influenced and Corrupt Organizations. It would seem more appropriate to place this new section in ch. 45, F.S., which pertains to civil practice and procedure.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
