

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

When a money judgment is entered, a defendant¹ has a couple of options to consider. First the defendant 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, defendant risks the possibility that the plaintiff may begin collecting on the judgment while the appeal is ongoing.² It is possible that defendant could prevail on appeal but the judgment has already been executed and the defendant's money and assets have vanished.

A defendant can avoid this situation by posting a bond. A sufficient bond entitles defendant to an automatic stay of the judgment while the appellate court rules on the matter.³ A sufficient bond, or a supersedeas bond, is a defendant'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.⁴ 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.⁵ However, the trial court retains jurisdiction to determine the sufficiency of any bond.⁶ 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...."⁷

The purpose behind a supersedeas bond requirement is that it will protect a plaintiff 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.'"⁸

The following excerpt from "*Just what is a civil supersedeas bond and do I need one?*"⁹ 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

¹ This analysis uses the terms plaintiff and defendant for ease of reference and should not be understood to imply that a plaintiff prevails in every legal action or that a defendant is always the nonprevailing party.

² 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.*, 48 Fla. 190, 37 So. 523, 525 (1904)).

³ Florida Rule of Appellate Procedure 9.310 provides: "[a] stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both."

⁴ 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.

⁵ Rule 9.310(b)(1), Fla. R. App. P.

⁶ *Id.*

⁷ Rule 9.310(c)(2), Fla. R. App. P.

⁸ *Freedom Insurors, Inc.*, 869 So. 2d 1285.

⁹ *Just what is a civil supersedeas bond and do I need one?*, Angela C. Flowers, The Record, Florida Bar Journal Appellate Practice Section, Fall, 1999.

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 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 1¹⁰.... By statute, the "interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid."

Effect of Bill

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 \$25 million dollars for all defendants in the aggregate.¹¹ If a defendant is an individual or an independently owned and operated business with 400 or fewer full-time employees, the supersedeas bond, at the election of that defendant, may not exceed 5 percent of the defendant's net assets or \$1 million dollars in the aggregate.¹² However, if a plaintiff proves that an appealing defendant, who has posted a supersedeas bond, is moving assets to avoiding paying the judgment, then a court may require the defendant post a supersedeas bond in the total amount of the judgment.¹³

C. SECTION DIRECTORY:

Section 1 creates s. 768.734, placing limitations on supersedeas bonds.

Section 2 provides for an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

¹⁰ The interest rate established for calendar year 2006 has been set at 9.0% per annum or .0002466 per day, <<http://www.fldfs.com/aadir/aam612.htm>>, (last visited Feb. 9, 2006).

¹¹ Except for certified class actions subject to s. 768.733, F.S. Section 768.734(1).

¹² Section 768.734(2).

¹³ Section 768.734(3).

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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.

D. FISCAL COMMENTS:

In cases in which verdicts over \$25 million are awarded or substantially less for "an individual or independently owned and operated business with 400 or fewer full-time employees," 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 determine whether or not an appellant is intentionally dissipating or diverting assets necessitating an increase in the supersedeas bond.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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. Those rules of procedure are established by the Florida Supreme Court. The legislature has the authority to promulgate substantive laws,¹⁴ whereas, matters of practice and procedure in all state courts are the exclusive domain of the Florida Supreme Court.¹⁵

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.^{16 17}

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

¹⁵ *Id.*

¹⁶ *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002)(citing *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975)).

¹⁷ *See also Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991)(internal citations and quotations omitted) which stated:

"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."¹⁸

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.

Prospective and Retrospective Effect of a Change in Statutory Law

The distinction between substantive and procedural law is important for a determination regarding the effect of a statutory change. If a statute is substantive, then the statute is presumed to apply prospectively unless the Legislature expresses its clear intent to have the statute operate retrospectively. The rationale is that retrospective operation of law can act to impair or destroy an existing right. On the other hand, procedural or remedial statutes, would apply retrospectively and apply to pending cases. Accordingly, it would appear that any statutory change to the bond requirements in accordance with Rule 9.310, Fla. R. App. P, would apply to all pending cases where an award has not been reduced to judgment.

Access to Courts

"The right to go to court to resolve disputes is a fundamental right. Whether represented by an attorney or proceeding pro se, all litigants are afforded equal access to the courts. The Florida Constitution establishes the right commonly known as access to courts. It provides that the courts shall be open to any person for the redress of any injury and justice shall be administered without sale, denial, or delay."¹⁹

"There is no principle of law more fundamental than that which declares for every wrong there is a remedy. The constitutional right of access to courts guaranteed by the Florida Constitution, protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution. In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida."²⁰ However, "[a] reasonable restriction, or a condition precedent, to the filing of a claim is not a denial of access to courts."²¹

The bill would not appear to impinge upon an individual's Florida Constitutional right of access to courts since the legislature is not abolishing any cause of action, but is merely changing the procedures for a supersedeas bond.

B. RULE-MAKING AUTHORITY:

Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof.

¹⁸ 10A Fla. Jur 2d, Constitutional Law, s. 197.

¹⁹ 10A Fla. Jur 2d, Constitutional Law, s. 360.

²⁰ *Id.*

²¹ 10A Fla. Jur 2d, Constitutional Law, s. 362.

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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 class actions. Civil actions effected by this bill would include for example contract claims, anti-trust actions, and claims under Florida's Racketeering Influenced and Corrupt Organizations (RICO). It would seem more appropriate to place this new section in ch. 45, F.S. which pertains to civil practice and procedure.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 8, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment substituted the word election for discretion and included language to provide that an individual was eligible for a cap on a supersedeas bond. The bill was then reported favorably with a committee substitute.

This analysis has been updated to reflect the committee substitute adopted by the Civil Justice Committee at its March 8, 2006 meeting.