

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-299

IN RE: AMENDMENTS TO
FLORIDA RULE OF APPELLATE
PROCEDURE 9.310

COMMENT ON PROPOSED AMENDMENTS TO
FLORIDA RULE OF APPELLATE PROCEDURE 9.310
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COMMENT: THE PROPOSED RULE SHOULD BE MODIFIED TO ALLOW A LOWER TRIBUNAL DISCRETION TO REDUCE A SUPERSEDEAS BOND FOR PARTIES HAVING AN INSURANCE OR INDEMNIFICATION POLICY APPLICABLE TO THE CASE IN THE INTEREST OF JUSTICE AND FOR GOOD CAUSE SHOWN, BUT ANY REDUCTION SHOULD BE LIMITED TO THE AMOUNT OF COVERAGE AVAILABLE UNDER SUCH A POLICY.

This Court has requested comments on the following proposed amendment to Florida Rule of Appellate Procedure 9.310:

RULE 9.310. STAY PENDING REVIEW

(a) Application. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions.

(1) Money Judgments. If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond satisfying the above criteria.

(2) Reduction or Limitation on Bond Amount. Except in class actions subject to section 768.733, Florida Statutes, the amount of the supersedeas bond in subdivision (b)(1) is subject to modification as set forth in subdivisions (A) and (B) below:

(A) Reduction. A party seeking to stay execution of a judgment pending review may move the lower tribunal to reduce the amount of a supersedeas bond required to obtain such a stay. The lower tribunal,

in the interest of justice and for good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond. The lower tribunal may not reduce the supersedeas bond if the party seeking a stay has an insurance or indemnification policy applicable to the case.

(B) Limitation. Regardless of the amount of the judgment appealed, the supersedeas bond amount necessary to obtain an automatic stay in any civil action shall not exceed \$50 million for each appellant. The \$50 million amount shall be adjusted annually for inflation as provided by general law.

(3) Protection for Party Opposing Stay. If a party seeking to stay execution of a judgment pending review has posted a supersedeas bond for an amount less than that required for an automatic stay under division (b)(1), the opposing party may engage in discovery for the limited purpose of determining whether the party seeking the stay has dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so. If the lower tribunal determines that the party seeking a stay has dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so, the lower tribunal may enter orders necessary to protect the opposing party, require the party seeking a stay to post a bond in the amount up to, but not more than, the amount required for an automatic stay under subdivision (b)(1), and impose other appropriate remedies and sanctions.

(4) Public Bodies; Public Officers. [No change]

(italics added). This commenter's comment is limited to the last sentence of proposed Rule 9.310 (b)(2)(A).

This proposed rule amendment is being considered in light of the enactment of section 45.045, Florida Statutes (2006), which similarly provides:

45.045. Limitations on supersedeas bond; exception

(1) Except for certified class actions subject to s. 768.33, in any civil action brought under any legal theory, the amount of a supersedeas bond necessary to obtain an automatic stay of execution of a judgment granting any type of relief during the entire course of all appeals or discretionary reviews, may not exceed \$50 million for each appellant, regardless of the amount of the judgment appealed. The \$50 million amount shall be adjusted annually to reflect changes in the Consumer Price Index compiled by the United States Department of Labor.

(2) In any civil action brought under any legal theory, a party seeking a stay of execution of a judgment pending review of any amount may move the court to reduce the amount of a supersedeas bond required to obtain such a stay. The court, in the interest of justice and for good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond. The court may not reduce the supersedeas bond if the appellant has an insurance or indemnification policy applicable to the case. This subsection does not apply to certified class actions subject to s. 768.33.

(3) If an appellant has posted a supersedeas bond for an amount less than that which would be required for an automatic stay pursuant to Rule 9.310(b)(1), Florida Rules of Appellate Procedure, the appellee may engage in discovery for the limited 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.

(4) If the trial or appellate court determines that an appellant has dissipated or diverted assets outside the course of its ordinary business 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, but not more than, 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 obvious intent of the legislature in adopting section 45.045 was to protect appellants' constitutional rights of access to appellate courts and due

process in situations where posting of a bond in the amount required by Rule 9.310(b)(1) to obtain an automatic stay of an underlying money judgment is not feasible. Thus, under the statute and the proposed rule amendment, in the interest of justice and for good cause shown, the lower tribunal can reduce the amount of the bond. This commenter is in complete agreement with this portion of the proposed rule.

However, the last sentence of proposed Rule 9.310(b)(1)(A) provides a blanket exception that eliminates the lower tribunal's discretion to make any reduction in the bond amount required for an automatic stay under Rule 9.310(b)(1) "if the party seeking a stay has an insurance or indemnification policy applicable to the case" – regardless of the amount of coverage available under the policy. This blanket limitation on the lower tribunal's discretion to reduce the amount of the bond is contrary to the overall purpose of the statute and could lead to denial of appellants' rights to access to appellate courts and due process under certain circumstances. Accordingly, in keeping with the intent of the statute, and in order to safeguard the constitutional rights of all appellants, this commenter suggests that the last sentence of proposed Rule 9.310(b)(2)(A) be modified to read:

If the party seeking a stay has an insurance or indemnification policy applicable to the case, the lower tribunal may not reduce the supersedeas bond below the limits of coverage available under the policy.

LEGAL ANALYSIS

Precluding a lower tribunal from reducing the amount of the supersedeas bond below the amount necessary to obtain an automatic stay under Rule 9.310(b)(1) even in the interest of justice and for good cause shown simply because the party seeking the stay has an insurance or indemnity policy applicable to the case – regardless of the limits of coverage available under such a policy – could give rise to deprivation of appellants’ constitutional rights in certain circumstances. For instance, if a judgment is entered against a party for \$50 million and that party has negligible assets and an insurance policy providing \$10,000 in coverage, under proposed Rule 9.310(b)(2)(A), the lower tribunal would have no discretion to lower the bond below \$50 million even in the interest of justice and for good cause shown. If execution on that judgment or other collection efforts were permitted pending appeal, the appellant would be financially destroyed and could be forced into bankruptcy to stay the collection efforts. That disastrous result would occur even if the judgment is (or would be if the appellant could proceed) ultimately reversed on appeal. In that event, the appellant’s constitutional right to appeal would be rendered ineffective.

Florida law and public policy, as well as the Florida and United States Constitutions, dictate that an appellant should not be forced into bankruptcy in order to obtain meaningful appellate review of a potentially outrageous, excessive

and erroneous judgment, simply because that appellant happens to have some minimal amount of insurance coverage. A more rational approach would be to allow the lower tribunal, in the interest of justice and for good cause shown, to reduce the amount of the bond even for a party who has an insurance or indemnity policy applicable to the case, but limit the authority of the lower tribunal in this regard by limiting any such reduction to the amount of coverage available under the policy. Such an approach would allow a proper balancing of the interests of the appellee with regard to collection on the judgment and the constitutional rights of the appellant to challenge that judgment on appeal.

A. Rule 9.310 Should Be Amended To Permit The Lower Tribunal To Reduce The Amount Of The Bond In The Interest Of Justice And For Good Cause Shown, But If The Party Seeking The Stay Has An Insurance Or Indemnity Policy Applicable To The Case, A Reduction Should Not Be Permitted Below The Amount Of the Coverage Available Under The Policy.

“Appeals to the Supreme Court and the District Courts of Appeal are constitutionally guaranteed rights in this State. This being true, it is fundamental that statutes or rules regulating the exercise of such rights should be liberally construed in favor of the appealing party and in the interest of manifest justice.” Robbins v. S.D.S. Cipes, 181 So. 2d 521, 522 (Fla. 1966). Thus, a party’s right to appeal cannot be negated by “unreasonable burdens and restrictions. . . .” G.B.B. Invs., Inc. v. Hinterkopf, 343 So. 2d 899, 901 (Fla. 3d DCA 1977). Indeed, this Court has unhesitatingly stricken bond requirements that unreasonably restrict a

party's access to the courts. See Psychiatric Assocs. v. Siegel, 610 So. 2d 419 (Fla. 1992) receded from on other grounds by Agency for Health Care Admin. v. Associated Indus. of Fla., 678 So. 2d 1239 (Fla. 1996). To assure an appellant's right to a meaningful appeal, Rule 9.310 should be amended to ensure a "liberal[] constru[ction] in favor of the right" of access to the courts. Lehmann v. Cloniger, 294 So. 2d 344, 347 (Fla. 1st DCA 1974).

Thus, Rule 9.310 should be amended to afford the lower tribunal discretion to order a stay of a judgment based on a bond in an amount below the amount required for an automatic stay under Rule 9.310(b)(1) (i.e., the full amount of the judgment plus two years of interest) in the interest of justice and for good cause shown – even if the appellant happens to have an insurance or indemnity policy applicable to the case. Such a rule amendment is required to assure all appellants their right to obtain meaningful review of financially ruinous damages awards imposed against them. Without such ability, many such appellants would be forced into bankruptcy because the posting of a bond in the amount required by Rule 9.310(b)(1) for an automatic stay would be impossible and, thus, would constitute an unreasonable burden on such appellants' access to courts. See Lehmann, 294 So. 2d at 347; G.B.B. Invs., 343 So. 2d at 901.

Against this background, Rule 9.310 should be amended to allow the lower tribunal the discretion to stay a damages judgment against any appellant, in the

interest of justice and for good cause shown, based on the posting of a bond in an amount below that required by Rule 9.310(b)(1) for an automatic stay. If the party seeking the stay has an insurance or indemnity policy applicable to the case, however, the bond should not be reduced below the amount of the coverage available under such a policy. Such a rule would protect the appellee with respect to the damages judgment to the extent of the insurance proceeds, which may be the only “asset” available for collection against in any event, while concomitantly protecting the appellant’s constitutional right to obtain meaningful appellate review of a financially ruinous damages judgment without facing complete insolvency and bankruptcy.¹ A rule that requires the lower tribunal to insist upon a bond in the full amount of the judgment plus two years of interest simply because the appellant has an insurance or indemnity policy – without regard to the amount of coverage afforded by that policy - would impermissibly deprive appellants in the scenario presented above of their constitutional right to access to courts.

Rule 9.310 should be amended to protect the rights of both parties pending appeal. See Palm Beach Heights Dev. & Sales Corp. v. Decillis, 385 So. 2d 1170, 1171 (Fla. 3d DCA 1980). Thus, the “rights” of the appellee with respect to a

¹ If the appellant is forced into bankruptcy based on collection efforts on the judgment, the appellee will become an unsecured creditor and the judgment may prove entirely uncollectible. See Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 799 (7th Cir. 1986)(a judgment creditor is an unsecured creditor once the defendant files for bankruptcy).

damages award should be balanced against the appellant's constitutional right to seek appellate review of an adverse judgment. See Art. I, § 21, Fla. Const. (“The courts shall be open to every person for redress of any injury”); Robbins, 181 So. 2d at 522 (access to courts provision applies with full force to appeals to the supreme court and the district courts because those appeals are “constitutionally guaranteed rights in this State”). This can be accomplished by amending the proposed rule as suggested herein.

B. Rule 9.310 Would Be Unconstitutional If It Failed To Afford The Lower Tribunal Discretion To Order A Stay Based On The Interest Of Justice And Good Cause Shown Simply Because The Appellant Has An Insurance Or Indemnity Policy.

Article I, Section 21 of the Florida Constitution provides that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” This constitutional right of access applies fully to appeals to the “[S]upreme Court and the District Courts of Appeal.” Robbins, 181 So. 2d at 522. See also Kennedy v. Guarantee Mgmt. Servs., Inc., 667 So. 2d 1013 (Fla. 3d DCA 1996) (access to appellate courts is constitutionally recognized right); Bain v. State, 730 So. 2d 296, 299 (Fla. 2d DCA 1999) (same); Lehmann, 294 So. 2d at 347 (same). Further, Article V, Section 4(b)(1) of the Florida Constitution provides that the district courts of appeal shall have jurisdiction to hear “appeals, that may be taken as a matter of right, from final judgments or orders of trial courts” (emphasis added). This provision makes

clear “that all final orders may be appealed as a matter of right.” Bain, 730 So. 2d at 300 (emphasis added).

The Florida Constitution guarantees the right of access to the courts “free of unreasonable burdens and restrictions. . . .” G.B.B. Invs., 343 So. 2d at 901 (emphasis added). Given this constitutional guarantee, Rule 9.310 should be amended to ensure that bonding requirements are not imposed in a manner that unreasonably denies access to courts. As the court in Lehmann held:

Access to the courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right. All related rules should be construed in para materia and if, when so construed, ambiguities develop, those ambiguities should be construed in favor of, and not in restriction of, access to courts, including the appellate courts.

294 So. 2d at 347. Accord Kennedy, 667 So. 2d at 1014; Bain, 730 So. 2d at 300.

Amending Rule 9.310 in such a way as to preclude a construction that would allow the lower tribunal to reduce the bond amount required for the stay of a money judgment simply because there is an insurance or indemnity policy applicable to the case – without regard to the amount of coverage available under the policy – would create constitutional problems in the scenario discussed herein.

Consistent with these principles, this Court applied Article I, Section 21, of the Florida Constitution to invalidate a statute requiring the posting of a bond prior to filing suit in medical staff privilege disputes. Psychiatric Assocs., 610 So. 2d at 419. The claimants in that case challenged the law based upon its “practical

effect” in limiting their right of access to the courts. Id. at 423. In sustaining this challenge, this Court held that the statutory bond requirement impermissibly “infring[ed]” upon the plaintiff’s “fundamental right of access to the courts.” Id. at 421. As the Court explained, “[t]he right to go to court to resolve our disputes is one of our fundamental rights. With the exception of the state constitution in 1868, Florida has incorporated an express provision guaranteeing a person’s right of access to the courts in each of its constitutions. The history of the provision shows the courts’ intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes.” Id. at 424.

Significantly, in Psychiatric Associates, this Court held that a bond requirement need not “totally abrogate a plaintiff’s right of access to the courts” to violate Florida’s access to courts provision. Id. at 423-424. Instead, bond restrictions that merely “create an impermissible restriction on access to the courts” are unconstitutional. Id. at 424. That would be precisely the case if Rule 9.310 were amended to provide a mandatory, non-discretionary rule requiring a bond in the full amount of a money judgment, even in the extraordinary circumstances of an unprecedented verdict and judgment, simply because the judgment debtor may happen to have an insurance or indemnity policy with relatively minimal limits. If the lower tribunal never has discretion in such a situation to permit a bond or other security in an amount less than the judgment, regardless of the interest of justice

and good cause shown, Rule 9.310 would “create an impermissible restriction on access to the courts.” Id. at 424.

This Court also invalidated the bond statute at issue in Psychiatric Associates on due process grounds. As the Court explained:

Even if we accepted the view that the bond requirement is reasonably related to a permissible legislative objective, the bond requirement would violate due process because it is arbitrary and capricious. The bond requirement arbitrarily cuts off a plaintiff’s right to be heard solely because of inability to post a bond. Unlike other financial barriers to the courts, such as filing fees and bonds covering costs, the bond requirement statutes contain no provisions for a trial court to weigh a plaintiff’s ability to post the bond or to waive the bond if the plaintiff is unable to pay. Thus, these bond requirements are arbitrary and capricious because they deny plaintiffs . . . the right to be heard on the basis of one’s financial status.

Psychiatric Assoc., 610 So. 2d at 425-26 (emphasis added). So too here, if Rule 9.310 were amended to impose an absolute bond requirement – regardless of the appellant’s financial ability to post such a bond – to stay the very damages judgment being challenged on appeal simply because the appellant has an insurance or indemnity policy providing relatively minimal coverage, it would suffer from the same constitutional infirmity found in the statute struck down by this Court in Psychiatric Associates.

In many cases it is impossible for an appellant to post a bond in the amount required to obtain an automatic stay of the judgment under Rule 9.310(b)(1). The amount of collateral that would be necessary to secure such a bond could far

exceed the appellant's net worth and assets. Hence, the appellant would be forced into bankruptcy if immediate execution and collection proceedings were permitted. Rule 9.310 should be amended to give the lower tribunal discretion to allow a bond in an amount less than the judgment. Such a rule would assure the constitutional right of access to courts "free of unreasonable burdens and restrictions." See G.B.B. Invs., 343 So. 2d at 901; see also State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994) ("[w]henver possible, a statute should be construed so as not to conflict with the constitution") (internal quotation omitted). At the same time, if the appellant has an insurance or indemnity policy that applies to the case, the interests of the appellee can be protected by limiting any such reduction to the amount of the coverage available under the applicable policy. To eliminate all discretion to reduce the bond in such a situation could effectively deprive some appellants of their right to appeal.

C. The Due Process Guarantees Of The United States Constitution Prohibit A Non-Discretionary Rule.

The due process protections of the United States Constitution mean that a state may not act arbitrarily in administering its laws, including its appellate remedies. As the Supreme Court declared in Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), "it is now fundamental that, once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

Based on these constitutional protections, the district court and Second Circuit struck down a mandatory bond requirement in circumstances much like those posited herein in Texaco Inc. v. Pennzoil Co., 784 F. 2d 1133 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987).² The Second Circuit reasoned:

[D]ue process requires that once a state has created a right of appeal it must “offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.” [citation omitted] A state would deny a defendant such a “fair opportunity” if it reduced the appeal to a “meaningless ritual” by denying him the means effectively to press his appellate arguments. [citations omitted] It is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness. [citations omitted] Thus, an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor’s property without due process.

Texaco, 784 F.2d at 1154 (emphasis added).

² The Supreme Court reversed on grounds of abstention, holding that the constitutional challenge should have been brought in a Texas state court. It accordingly declined to address the Second Circuit’s holding that a bond requirement that effectively deprives a party of a right to appeal violates the Due Process Clause. Subsequent cases, however, have relied upon the Second Circuit’s decision. See, e.g., Miami Int’l Realty Co. v. Paynter, 807 F.2d 871 (10th Cir. 1986) (citing Texaco and holding trial court properly refused to require full bond and thereby place the defendant in insolvency).

Texaco involved what was, at that time, the largest jury verdict in American history. Pennzoil won an \$11.2 billion verdict against Texaco in Texas state court on a tortious interference claim – consisting mostly of compensatory damages. The Texas rules provided that, in order to stay execution of the judgment pending appeal, a party had to post a supersedeas bond “in at least the amount of the judgment, interest and costs.” Id. at 1138.

The Texas rule was mandatory; the trial court had no discretion to reduce the amount of the supersedeas bond. But Texaco could not obtain the required bond because it was estimated that the worldwide surety bond capacity ranged from \$1 billion to \$1.5 billion under the best possible circumstances. Id. In addition, a party would have to provide full collateralization for bonds of “such huge proportions.” Id. Texaco could not liquidate enough assets to collateralize a bond in the full amount of the judgment and retain enough liquid assets to operate its business. To avoid execution, Texaco’s only alternative was bankruptcy or liquidation. Id. This “interim injury,” amounting to the “irrevocable destruction of [Texaco’s] business [through] bankruptcy or liquidation . . . cannot be measured in damages and would in no event be recoverable.” Id. at 1153.

Based on these circumstances, the Second Circuit invalidated the mandatory bond requirement, holding it “lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility. This would at

least amount to a deprivation of [Texaco's] property in violation of its right to due process under the Constitution.” Id. at 1144.

Under the currently proposed amendment to Rule 9.310, an appellant subject to a financially ruinous judgment faces exactly the same danger if that appellant simply happens to have an insurance or indemnity policy with relatively minimal limits. Like Texaco, such an appellant could not post a bond in the full amount of the judgment. Like Texaco, absent a stay, such an appellant would have to file for bankruptcy to avoid collection efforts. In that circumstance, the appellant's constitutionally guaranteed appeal would become a meaningless, academic exercise, because the improper effect of the damages award would have already occurred before the appellate court could act. See Trans World Airlines v. Hughes, 515 F.2d 173, 178 (2d Cir. 1973) (“if a defendant has to liquidate all or a substantial part of his business in order to exercise the right of appeal, then the appeal may surely be of doubtful value”).

As the Texaco decision makes clear, a bond requirement that “would reduce [a party's] appeal to a meaningless ritual” is unconstitutional. Where a party can avoid execution only by posting an unattainable bond or declaring bankruptcy, its right to appeal would be rendered “an exercise in futility” and a “meaningless ritual,” “robbed of any effectiveness.” Id.; see also Elaine Carlson, Mandatory

Supersedeas Bond Requirements - A Denial of Due Process Rights?, 39 Baylor L. Rev. 29 (1987).

Given the foregoing, Rule 9.310 should be amended (as proposed) to afford the lower tribunal discretion to stay a money judgment pending appeal conditioned on terms other than a bond for the full amount of the judgment being challenged on appeal. But the discretion of the lower tribunal should not be taken away in this regard simply because the party seeking the stay happens to have an insurance or indemnity policy applicable to the case (as currently proposed). Rather, that fact should simply be considered as one factor on the interest of justice and good cause showing which would preclude reduction of the bond below the amount of the coverage provided by any such policy.

Accordingly, Rule 9.310 should be amended so that, subject to the interest of justice and a good cause showing, a party who has an insurance or indemnity policy applicable to the case but no other assets can obtain a stay of a financially ruinous judgment pending appeal by posting a supersedeas bond in the amount of the insurance policy limits and other terms that are reasonable under the circumstances. See Miami Int'l Realty Co. v. Paynter, 807 F.2d 871 (10th Cir. 1986)(upholding trial court's order permitting a stay pending appeal of a \$2.1 million judgment on the posting of defendant's \$500,000 insurance policy limits where defendant did not have sufficient assets to post a supersedeas bond for the

entire judgment over the insurance coverage limits and execution would place defendant in insolvency); Isern v. Ninth Court of Appeals, 925 S.W.2d 604 (Tex. 1996)(trial court did not abuse its discretion in requiring defendant to post a bond in the amount of the insurance policy limit of \$500,000 although verdict was for \$3.1 million where defendant could not post a bond in the full amount of the judgment); O'Donnell v. McGann, 529 A.2d 372 (Md. 1987)(upholding court's ruling that amount of bond would be limited to amount of defendant's insurance policy limits and assets).

D. Section 45.045 Is No Impediment To Modifying The Proposed Rule As Suggested In This Comment.

The language in proposed Rule 9.310(b)(2)(A) complained about in this comment mirrors the language in section 45.045. See § 45.045(2), Fla. Stat. (2006) (“The court may not reduce the supersedeas bond if the appellant has an insurance or indemnification policy applicable to the case.”). However, the statute is no impediment to this Court adopting different language in Rule 9.310(b)(2)(A). Indeed, given the overall purpose of the statute, the modified language suggested in this comment is entirely consistent with the intent of the statute.

But even if the legislature had intended to create a rule that precludes a party from obtaining a stay of a money judgment for anything less than the amount of the judgment if that party has an insurance or indemnity policy applicable to the case, this Court is not bound to adopt such a rule. Indeed, as discussed above, the

statute itself would be unconstitutional under the scenario posited above. But, in any event, the legislature has no constitutional authority to enact any law relating to practice and procedure in the courts. See Military Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020, 1021 (Fla. 4th DCA 1981) (“Matters of practice and procedure in state courts are solely the province of the Supreme Court. . . Powers constitutionally bestowed upon the courts may not be exercised by the legislature. . . Thus it has been held that a statute which purports to create or modify a procedural rule of court is constitutionally infirm.”).

Indeed, the legislature itself recognized that it was possibly invading the province of this Court by enacting the statute in the first instance. See Senate Staff Analysis and Economic Impact Statement, CS/SB 2550 (April 27, 2006) (noting that “[t]his bill could raise a constitutional concern if the limits imposed on supersedeas bonds were considered a procedural rather than a substantive law”); see also House of Representatives Staff Analysis, HB 841 CS (April 21, 2006) (same). This Court is constitutionally mandated to “adopt rules for the practice and procedure in all courts” Art. 5, § 2(a), Fla. Const. “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.” In re Fla. Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972), order amended by 272 So. 2d 513 (Fla. 1973). Therefore, to the extent that the statute

attempts to regulate practice and procedure, rather than substantive law, it unconstitutionally encroaches on this Court's rulemaking power.

Given the circumstances under which a court can stay enforcement of a judgment clearly fall within this Court's rulemaking power, nothing in section 45.045 precludes this Court from adopting a rule that would allow the lower tribunal to stay a money judgment pending appeal based on the interest of justice and good cause shown by a party even if that party happens to have an insurance or indemnity policy applicable to the case. Due deference can be given to the legislature by limiting any such reduction to the amount of coverage available under any such policy.

CONCLUSION

This commenter respectfully suggests that the proposed amendment to Rule 9.310 be adopted, but that the last sentence in proposed Rule 9.130(b)(2)(A) be modified to read:

If the party seeking a stay has an insurance or indemnification policy applicable to the case, the lower tribunal may not reduce the supersedeas bond below the limits of coverage available under the policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by email and U.S. Mail to: Edward Maurice Mullins, Esq., Committee Chair, Appellate Civil Rules Committee, Astigarraga, Dave, Mullins & Grossman, P.A., 701 Brickell Avenue, 16th Floor, Miami, Florida 33131-2847, this 30th day of April, 2007.

By: _____
Paul L. Nettleton

**CERTIFICATE OF COMPLIANCE
REGARDING TYPE SIZE AND STYLE**

I HEREBY FURTHER CERTIFY, that the type size and style used throughout the foregoing Comment On Proposed Amendment To Florida Rule of Appellate Procedure 9.310 is Times New Roman 14-Point Font.

By: _____
Paul L. Nettleton