

IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1611

L.T. No.: 1D10-2820

2012 JUN -8 PM 3:05

AMANDA JEAN HALL,
PETITIONER,

BY 

v.

ORIGINAL

R.J. REYNOLDS TOBACCO COMPANY,
RESPONDENT.

**BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION
AND THE FLORIDA JUSTICE REFORM INSTITUTE AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

On Discretionary Review from a Decision of the
First District Court of Appeal of Florida

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INTEREST OF THE AMICI CURIAE

The American Tort Reform Association (“ATRA”) is a non-profit, non-partisan organization formed in 1986. It is dedicated exclusively to reforming the civil justice system throughout the United States. ATRA represents more than 300 businesses, corporations, municipalities, associations, and professional firms. ATRA is especially concerned with the costs of excessive civil litigation on society. In addressing that issue, ATRA has been actively involved in the implementation of appeal bond legislation in dozens of states, including the Florida appeal statute at issue in this case.

The Florida Justice Reform Institute (“FJRI”) is an organization of concerned citizens, small business owners, business leaders, doctors, and lawyers, all working toward the common goal of restoring predictability and personal responsibility to civil justice in Florida. FJRI works to restore faith in the Florida judicial system and protect Floridians from the social and economic toll that results from rampant litigation. It is the first independent organization focused solely on civil justice in Florida.

ATRA and FJRI have a particular interest in this case, because Hall’s constitutional challenge to Florida’s appeal bond statute, section 569.23(3), Florida Statutes, directly implicates ATRA’s and FJRI’s mission to help improve the fairness, predictability, and efficiency of America’s and Florida’s civil justice system. Hall contends that the legislature overstepped its constitutional authority

with respect to this statute because it pertains to court procedure, and thus its enactment violates the separation of powers principle enshrined in Florida's Constitution.¹ But in fact, the appeal bond statute reflects a strong national trend to protect the right to appeal by limiting exorbitant appeal bonds. These statutes facilitate an important substantive goal, and thirty-five states have enacted legislation placing sensible limits on appeal bonds. ATRA and FJRI have a strong interest in supporting the constitutionality of these statutes, including section 569.23(3) Florida Statutes

SUMMARY OF ARGUMENT

The Florida bond cap statute challenged in this case, section 569.23(3), Florida Statutes, promotes and protects the right to appeal guaranteed in the Florida Constitution. Because it is a substantive law designed to protect a constitutional right, it does not violate the Florida Constitution's separation of powers principles.

Florida is among the vast majority of states in limiting the size of appeal bonds. Thirty-nine other states protect the right to appeal by capping the bond amount necessary to exercise the right to appeal. Not one of these thirty-nine other statutes has ever been held unconstitutional. And the only other time a

¹ Hall also attacks the constitutionality of § 569.23(3) for other reasons, which are not discussed in this brief.

constitutional challenge to an appeal bond statute was brought in Florida, the Third District Court of Appeal upheld the statute over similar challenges to those brought in this case.

ARGUMENT

This Court should uphold the Legislature's right to make substantive law under the Florida Constitution. *See* Art. II, § 3, Fla. Const. (separating powers between branches of government). "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). Often, laws contain elements of both procedure and substance. *See e.g., Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000) (finding a statute created substantive rights and that any procedural provisions were "intimately related to the definition of those substantive rights"). In such a case, if the substantive and procedural aspects are "intertwined," a constitutional challenge should be rejected. *See id.* ("We have consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights.").

The Florida bond cap statute at issue here, codified at section 569.23(3), Florida Statutes, is intended to protect Florida's constitutional right to appeal. Florida's legislature has four times acted to protect the right to appeal by enacting legislation limiting the size of appeal bonds. Similarly, the legislatures of thirty-nine other states have also chosen to protect the substantive right to appeal by

enacting limits on the size of appeal bonds, none of which has ever been found to be unconstitutional. The only other constitutional challenge to such a statute came in Florida as well, and in that case, the appeal bond statute was found to be constitutional. *See BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd.*, 998 So. 2d 1 (Fla. 3d DCA 2008).

I. THIRTY-NINE STATES HAVE PROTECTED THE RIGHT TO APPEAL BY ENACTING STATUTES LIMITING APPEAL BONDS, AND FLORIDA'S LEGISLATURE HAS BEEN THE MOST ACTIVE OF ALL.

Rule 9.310 of the Florida Rules of Appellate Procedure explicitly acknowledges that the Legislature constitutionally may enact statutes addressing stays pending review. Rule 9.310(a), which controls the application of the rule, is prefaced by the language "Except as provided by general law" Recognizing that stays pending appeal are tied to the substantive constitutional right to appeal, the Supreme Court anticipated that the Legislature might address this issue. The Legislature's enactments in this area fit squarely within its constitutional authority as recognized by the Supreme Court.

The Legislature has acted under this authority on four separate occasions. In 2000, the Legislature adopted section 768.733, Florida Statutes, creating a \$100 million limit on supersedeas bonds relating to punitive damages in certified class actions. In 2003, the Legislature adopted section 569.23, Florida Statutes, creating a \$100 million limit on supersedeas bonds in actions involving signatories to the tobacco settlement agreement. In 2006, the Legislature adopted section 45.045,

Florida Statutes, creating a \$50 million limit on supersedeas bonds. Finally, in 2009, the Legislature amended section 569.23 to add a new subsection 569.23(3) that created a sliding-scale appeal bond limit for cases involving signatories to the tobacco settlement agreement and former class members of decertified classes. These enactments are anticipated, and indeed authorized, by the language of Rule 9.310.

Florida's legislature has been joined by thirty-nine other state legislatures in enacting laws limiting the size of appeal bonds. *See Appendix.*² This reflects the deep concern of legislators throughout the nation that as damage awards have increased, the appeal bond requirement may impair the right of appeal. Most of these states have a separation of powers principle embedded in their constitutions,³ and in none of those states has that principle served to bar legislation intended to protect the right to appeal.

The fact that so many states have passed appeal bond limitation statutes is an indication that legislators across the country feel that such laws are critical to the protection of the right to appeal. Florida's legislature has been the most active in the country in this regard, legislating four times to limit the size of appeal bonds and thereby protecting the right to appeal. In doing so, the legislature has acted in

² As indicated by the chart in the Appendix, these statutes tend to apply either to civil litigation of all types or to civil litigation involving tobacco settlement agreement signatories. Florida has enacted both types of legislation.

³ *See G. Alan Tarr, Interpreting the Separation of Powers in State Constitutions*, 59 NYU Annual Survey of American Law 329, 337 (2003) ("As of 1998, forty state constitutions contained express separation-of-powers requirements.").

a manner entirely consistent with its powers granted under the Constitution of Florida.

II. THE FLORIDA LEGISLATURE HAS ADOPTED A PUBLIC POLICY OF PROMOTING THE SUBSTANTIVE RIGHT OF APPEAL.

The Florida Constitution guarantees the right to appeal. *T.A. Enters. v. Olarte Inc.*, 931 So. 2d 1016, 1018 (Fla. 4th DCA 2006) (“Article V, section 4(b)(2) of the Florida Constitution grants a constitutional right to appeal ‘as a matter of right, from final judgments or orders of trial courts.’”) (citation omitted). The Florida Legislature, in passing the legislation described above, has recognized that an unrestrained supersedeas bond requirement can distort the judicial system and unconstitutionally limits the right of appeal.

Defendants who are subject to exorbitant damage awards invariably seek to appeal them, and they often succeed in having the judgments reduced or overturned on appeal. Without a limitation on the required supersedeas bond under Rule 9.310, defendants subject to such huge damage awards, or to multiple judgments that may in total accumulate to enormous monetary damages, may simply be unable to post a bond to protect their assets while they appeal. In order to stop a plaintiff from seizing their assets during an appeal, defendants are faced with two alternatives: first, they may be forced into seeking bankruptcy protection, which carries with it an automatic stay of the debtor’s obligations to pay its creditors, but filing for bankruptcy is for many reasons a highly unpalatable choice,

particularly for a corporation and its business partners and employees; second, they may be forced into a disadvantageous settlement, the terms of which are dictated by the interference with the substantive right of appeal due to the appeal bond requirement rather than the merits of the case.

The risks posed by high supersedeas bonds are not merely hypothetical. The problems caused by exorbitant supersedeas bonds have been most vividly demonstrated in Florida by the *Engle* case, in which a class of smokers was awarded \$145 billion in punitive damages. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006). If Rule 9.310 applied, the *Engle* defendants would have been forced to post a bond equal to 125 percent of the verdict, or \$181 billion. Since no company or industry could post such a bond, the only way for the defendants to obtain a stay would have been for them to declare bankruptcy. To prevent this unconstitutional abrogation of the right to appeal, the Florida Legislature enacted section 768.733, which limited the supersedeas bond to \$100 million. The companies posted a bond under this statute and appealed the verdict. In December 2006, this Court rejected the \$145 billion punitive damages award, holding that it was “excessive as a matter of law.” *Id.* The *Engle* case vividly demonstrates the need to allow a full appellate consideration of the issues in cases where large damages, particularly punitive damages, are awarded.

As discussed in section I, the Legislature has taken the opportunity to protect the right to appeal by enacting appeal bond limitations on four separate occasions.

These appeal bond limits reflect the Legislature's concern that large damage awards threaten the defendant's right to appeal and the Legislature's adoption of a public policy to protect the right to appeal.

III. THE THIRD DISTRICT HAS HELD THAT THE LEGISLATURE ACTED WITHIN ITS AUTHORITY IN ENACTING A SIMILAR APPEAL BOND CAP.

The Third District Court of Appeal upheld the Legislature's adoption of a public policy to protect the right to appeal by enacting appeal bond limits. In *BDO Seidman*, the Third District confronted a constitutional challenge to section 45.045, which limits the appeal bond to \$50 million in most civil cases. The trial court allowed BDO Seidman, the judgment debtor, to post a \$50 million bond to stay execution of a judgment under section 45.045. *Id.* at 1. The judgment creditor challenged the trial court's entry of the stay, arguing that section 45.045 unconstitutionally infringed on the Florida Supreme Court's rulemaking authority over procedural matters. *Id.* at 2.

The appellate court held that the statutory cap on supersedeas bonds did not unconstitutionally intrude into the practice and procedure of the judiciary. *Id.* The court noted that Rule 9.310(a) "expressly authorizes modifications to its terms as 'provided by general law.'" *Id.* It determined that the appeal bond cap "concerns substantive rights to property and to appeal," and reasoned, "since the legislature holds the power to preclude the stay of payment, it likewise holds the power to limit the amount required to secure a payment stay." *Id.* at 2-3. This Court denied

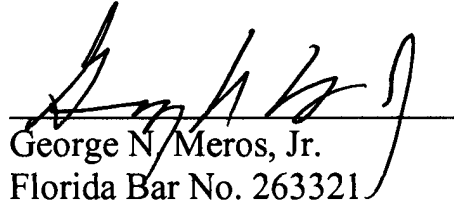
review. See *Banco Espirito Santo Int'l, Ltd. v. BDO Seidman, LLP*, 996 So. 2d 211 (Fla. 2008).

This Court should uphold the Legislature's authority to adopt limits on the amount required to secure a stay in order to protect the right to appeal. Like the bond cap upheld by the court in *BDO Seidman*, the bond cap at issue in this case was intended by the Legislature to ensure a meaningful right to appeal, and it certainly has that effect. The Legislature acted pursuant to proper authority to protect the substantive right to appeal, and this court should uphold the challenged legislation.

CONCLUSION

For the foregoing reasons, the Court should uphold the constitutionality of section 569.23(3), F.S.

Respectfully submitted,



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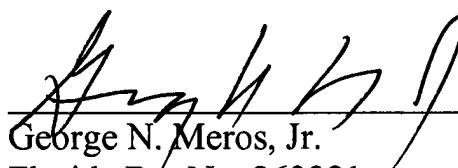
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

A handwritten signature in black ink, appearing to read "George N. Meros, Jr.", is written over a horizontal line.

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APPENDIX

SUMMARY OF LEGISLATION AND COURT RULES LIMITING THE SIZE OF APPEAL BONDS

Jurisdictions That Have Not Adopted Legislation Or Court Rules Limiting The Size Of Appeal Bonds

Alaska
Delaware
District of Columbia
Illinois

Maryland
Montana
New York

Enacted Or Adopted Appeal Bond Legislation Or Court Rules

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Alabama	Ala. Code § 6-12-4	2/24/2006	Master Settlement Agreement signatories, successors, and affiliates	\$125,000,000	Applies to civil litigation under any legal theory.
Arizona	Ariz. Code § 12-2108 created by S.B. 1212	4/13/2011	All litigants	The lesser of the total amount of damages (excluding punitive damages), 50% of the defendant's net worth, or \$25,000,000	Applies to all judgments in a civil action under any legal theory.
Arkansas	Ark Code § 16-55-214 amended by S.B. 937	3/27/2003 3/30/2005	All litigants	\$25,000,000	Applies to all judgments in civil litigation regardless of legal theory. As passed in 2003, applied only to causes of action that accrued on or after March 25, 2003. Broadened in 2005 to apply to all causes of action regardless of when they accrued.
California	Cal. Health & Safety Code § 104558	8/9/2003	Master Settlement Agreement signatories, successors, and affiliates	The lesser of 100% of the judgment or \$150,000,000	Applies to all judgments in civil litigation regardless of legal theory

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Colorado	Colo. Rev. Stat. § 13-16-125	5/20/2003	All litigants	\$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Florida	Fla. Stat. § 768.733	5/9/2000	All litigants in class actions	\$100,000,000	As passed in 2000, applied to judgments for non-compensatory damages.
	§ 569.23	6/10/2003	Master Settlement Agreement signatories, successors, and affiliates	\$100,000,000	Broadened in 2003 to apply to all money judgments under any legal theory
	§ 45.045	6/22/2006	All litigants except in certified class actions	\$50,000,000	Applies to all judgments in civil litigation regardless of legal theory.
	§ 569.23(3)	6/16/2009	Master Settlement Agreement signatories, successors, and affiliates	\$200,000,000	Applies to <i>Engle</i> progeny litigation, and creates an overall appeal bond cap for all of these cases combined.
Georgia	Ga. Code Ann. § 5-6-46	3/30/2000	All litigants	\$25,000,000	Applies to punitive damages only
		5/17/2004			Broadened in 2004 to apply to all forms of judgments in civil litigation.

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Hawaii	Haw. Rev. Stat. Ann. § 328L-7	7/2/2004	Master Settlement Agreement signatories, successors, and affiliates	\$150,000,000	Applies to all forms of judgments in civil litigation under any legal theory
		4/21/2006	Litigants other than Master Settlement Agreement signatories.	\$25,000,000	Applies to all forms of judgments in civil litigation under any legal theory
			Small businesses	\$1,000,000	Applies to all forms of judgments in civil litigation under any legal theory
Idaho	Idaho Stat. Ann. § 13-202	3/26/2003	All litigants	\$1,000,000	Applies to punitive damages only
Indiana	Ind. Code Ann. § 34-49-5-3	3/14/2002	All litigants	\$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Iowa	Iowa Code § 625A.9	9/7/2004	All litigants	\$100,000,000	Applies to appeals from money judgments
Kansas	Kan. Code § 50-6a05	4/21/2003 4/5/2005	Master Settlement Agreement signatories and their successors; broadened in 2005 to include any codefendants	\$25,000,000	Applies to all judgments in civil litigation regardless of legal theory.
Kentucky	Ky. Rev. Stat. Ann. § 411.187	3/29/2000	All litigants	\$100,000,000	Applies to punitive damages portion of a judgment
		4/5/2007	All litigants	\$100,000,000	Applies to all judgments in civil litigation regardless of legal theory

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Louisiana	La. Rev. Stat. Ann. § 98.6	6/25/2001 7/2/2003	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2003 to include "affiliates"	\$50,000,000	Applies to all money judgments
Michigan	Mich. Comp. Laws. Ann. § 600.2607(1)	5/8/2002	All litigants	\$25,000,000 plus COLA every 5th year	Applies to all judgments in civil litigation
Minnesota	Minn. Stat. Ann. § 550.36	5/13/2004	All litigants	\$150 million	Applies to all forms of judgments in civil litigation under any legal theory
Mississippi	Miss. R. App. R. 8	4/26/2001	All litigants	The lesser of the following: 1. 125% of the judgment 2. 10% of the net worth of the defendant 3. \$100,000,000	Applies to the punitive damages portion of a judgment
Missouri	Mo. Rev. Stat. § 512.085	7/10/2003	Master Settlement Agreement signatories, successors, and affiliates	\$50,000,000	Applies to all forms of judgments in civil litigation
Nebraska	Neb. Stat. Rev. § 25-1916	4/15/2004	All litigants	The lesser of the following: 1. Amount of the money judgment 2. 50% of appellant's net worth 3. \$50 million	Applies to all forms of judgments in civil litigation
Nevada	Nev. Stat. § 20.035.1 amended by 2005 Nev. Laws Ch. 138 (A.B. 486)	5/29/2001 5/24/2005	Master Settlement Agreement signatories, successors, and affiliates	\$50,000,000	Applies to all forms of judgments in civil litigation. Broadened in 2005 to include successors and affiliates of signatories

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
New Jersey	N.J. Stat. Ann. § 52:4D-13	11/21/2003	Master Settlement Agreement signatories, successors, and affiliates	\$50,000,000	Applies to all forms of judgments in civil litigation
New Mexico	N.M. Stat. § 39-3-22	4/3/07	Master Settlement Agreement signatory, successors, and affiliates	\$100,000,000	Applies to all judgments in civil litigation regardless of legal theory
North Carolina	N.C. Gen. Stat. § 1-289	4/5/2000 4/23/2003	All litigants	\$25,000,000	As passed in 2002, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
North Dakota	ND Cent. Code § 28-21-25	3/25/2005	All litigants	\$25,000,000	Applies to all forms of judgments in civil litigation
Ohio	Ohio Rev. Code Ann. § 2505.09	3/28/2002	All litigants	\$50,000,000	Applies to all forms of judgments in civil litigation

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Oklahoma	Okla. Stat. Ann. tit. 12 § 990.4 B.5	4/10/2001	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2004 to include successors and affiliates as well	\$25,000,000	As passed in 2001, applied to all forms of judgments in civil litigation involving Master Settlement Agreement signatories
		5/28/2004	Separate legislation was passed in 2004 that applies to all litigants	Separate legislation was passed in 2004 that gives the court discretion to lower the bond if judgment debtor can show that it is likely to suffer substantial economic harm if required to post bond in the amount required by statute (which is double the amount of the judgment)	Separate legislation was passed in 2004 that applies to all forms of judgments in civil litigation
Oregon	Or. Rev. Stat. § 19.312	9/24/2003	Master Settlement Agreement signatories, successors, and affiliates	\$150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Pennsylvania	35 P.S. § 5701.309	12/30/2003	Master Settlement Agreement signatories, successors, and affiliates	\$100,000,000	Applies to all judgments in civil litigation regardless of legal theory
Rhode Island	R.I. Gen. Laws § 42-133-11.1	7/4/08	Master Settlement Agreement signatories, successors, and affiliates	\$50,000,000	Applies to civil litigation under any legal theory

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
South Carolina	S.C. Code Ann. § 18-9-130	4/26/2004	Master Settlement Agreement signatories, successors, and affiliates	Appeal automatically stays execution of judgment - no bond required	Applies to all forms of judgments in civil litigation
South Dakota	Sup. Ct. R. 03-13	9/29/2003	All litigants	\$25,000,000	Applies to money judgments
Tennessee	Tenn. Code § 27-1-124	6/5/2003	All litigants	\$75,000,000	Applies to all forms of judgments in civil litigation
Texas	Tex. Civ. P. & Rem. § 52.006(b)	6/11/2003	All litigants	The lesser of 50% of the judgment debtor's net worth or \$25,000,000	Applies to money judgments
Utah	Sup. Ct. Order 2005-03-22 (amending URCP 62 governing appeal bonds)	1/24/2005	All litigants	\$25,000,000 -- compensatory damages \$0 -- punitive damages	Applies in class actions and actions involving multiple plaintiffs where damages are not proved for each plaintiff individually Applies in all actions and eliminates bond requirement for punitive damages
Virginia	Va. Code Ann. § 8.01-676.1 J	3/10/2000 4/8/2004	All litigants	\$25,000,000	As passed in 2000, applied only to punitive damages portion of a judgment; as passed in 2004, expanded to apply to all forms of judgments in civil litigation
Washington	Wash. Rev. Code § 43.340	3/27/06	Master Settlement Agreement signatories, successors, and affiliates	\$100,000,000	Applies to civil litigation under any legal theory

State	Statute / Rule / Bill	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
West Virginia	W. Va. Code § 4-11 A-4	5/2/2001 4/6/2004	As passed in 2001, applied only to Master Settlement Agreement signatories; amended in 2004 to clarify that the appeal bond limitations extend to appellants who control or are under common control with signatories to the Master Settlement Agreement	\$100,000,000 for all portions of a judgment other than punitive damages; \$100,000,000 for the punitive damages portion of a judgment	Applies to all civil litigation and provides that consolidated or aggregated cases shall be treated as a single judgment for purposes of the appeal bond limits
Wisconsin	Wis. Stat. Ann § 808.07	12/12/2003	All litigants	\$100,000,000	Applies to all judgments in civil litigation regardless of legal theory
Wyoming	Wyo. Stat. § 1-17-201	3/8/2007	All litigants	\$25,000,000; \$2,000,000 in any action in which all appellants are either individuals or have 50 or fewer employees	Applies to judgments of money or sale of property

JURISDICTIONS THAT DO NOT REQUIRE BONDS

Jurisdiction	Governing Rule
Connecticut	Proceedings to stay non-criminal judgments shall be stayed automatically until the final determination of the case. Conn. R. App. P. § 61-11.
Maine	The taking of an appeal operates as a stay of execution upon the judgment, and no supersedeas bond or other security shall be required. Me. R. Civ. P. 62.
Massachusetts	The taking of an appeal from a judgment shall stay execution upon the judgment during the pendency of the appeal. Mass. R. Civ. P. 62(d).
New Hampshire	No execution of a judgment shall issue until the expiration of the appeal period. N.H. Rev. Stat. Ann. § 527:1.
Vermont	The taking of an appeal operates to stay execution of the judgment during the pendency of the appeal; no supersedeas bond or other security is required. Vt. R. Civ. P. 62(d)(1).
Puerto Rico	Once a bill of appeal is filed, all further proceedings in lower courts regarding a judgment or any part thereof which is appealed, or the issues contained therein, shall be stayed, except for an order to the contrary, issued on its own initiative or by petition of a party thereto by the court of appeals. P.R. R. Civ. P. 53.9.