IN THE SUPREME COURT OF FLORIDA

AMANDA JEAN HALL, etc.,

Petitioner,

v.

R.J. REYNOLDS TOBACCO CO.,

Respondent.

ORIGINAL

Case No. SC11-1611
L.T. No. 1D10-2820

PETITIONER'S REQUEST FOR JUDICIAL NOTICE

The Petitioner Amanda Jean Hall requests the Court to take judicial notice of the attached filings from *Clay v. R.J. Reynolds Tobacco Co.*, Case No. 2008 CA 3020, and states:

1. Reynolds has filed a suggestion of mootness in this case because it has largely paid Ms. Hall's judgment at this point and, in any event, her judgment is no longer stayed under the subject statute. Additionally, in her reply brief, Ms. Hall explains the particular unfairness of the subject statute to the extent that it provides for a continuing stay after the district court of appeal affirms a judgment and issues its mandate. The attached filings in the *Clay* litigation, which involves the same defendant and a plaintiff represented by the same appellate counsel as in this case, are relevant to these points and will assist the Court in understanding the repercussions of the issue, especially if the Court determines that it may wish to

moot out some of the constitutional challenges by amending Florida Rule of Appellate Procedure 9.310(b)(2).

2. **Exhibit A** is the trial court's order rejecting the challenge that Ms. Clay brought to the same statute in her case. **Exhibit B** is the order by the First District Court of Appeal affirming that ruling. **Exhibit C** is the order by the First District Court of Appeal declining to certify that issue to this Court as it did in Ms. Hall's case. Collectively, these documents demonstrate that it is mere happenstance that the petitioner in this case is Ms. Hall instead of Ms. Clay.

3. **Exhibit D** is the First District's mandate following its affirmance of Ms. Clay's judgment. **Exhibit E** is Reynolds' motion filed in the trial court in which it contends that the automatic stay continues while it considers whether to file a petition for writ of certiorari. **Exhibit F** is Ms. Clay's response arguing that, at the very least, the stay can only continue if and when an actual petition for writ of certiorari is filed. The trial court has orally granted Reynolds' motion, and she will request judicial notice of that order when entered. **Exhibit G** is Reynolds' request to the United States Supreme Court to extend the time for filing a certiorari petition by 60 days to September 4, 2012. Pursuant to the Supreme Court's rules, this application is made directly to the applicable circuit justice (Justice Thomas in this case) and there is no provision for the respondent to oppose the application. Sup. Ct. R. 13.5.

4. The undersigned counsel wishes to use Ms. Clay's predicament as an example during oral argument in this case to demonstrate why the Court should neither dismiss this appeal as moot nor invoke its rulemaking authority to adopt the procedures contained in section 569.23. To be clear, these records are not relevant to the merits of this cause – i.e., whether this statute is constitutional. Accordingly, to the extent precedent on judicial notice by appellate courts would not support the request here, that precedent is inapplicable. *E.g., Hillsborough County Bd. of County Comm'rs v. Public Employees Relations Comm'n*, 424 So. 2d 132, 134-35 (Fla. 1st DCA 1982) (citing *Atlas Land Corp. v. Norman*, 156 So. 885 (Fla. 1934)).

5. Section 90.203, Florida Statutes (2012), provides that "[a] court shall take judicial notice of any matter in § 90.202" when a party requests it, gives timely written notice, and attaches the material. Section 90.202(6), Florida Statutes (2012), includes "[r]ecords of any court of this state." Even if this statute does not directly apply to this Court since it is part of the Evidence Code, *Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 424 So. 2d at 134, this Court's precedent predating section 90.203 provides that an appellate court may take judicial notice of records in other cases if "it be brought to the attention of the court by being made a part of the record in the case under consideration." *E.g., S. Fla. Lumber & Supply Co. v. Read*, 61 So. 125, 127 (Fla. 1913).

WHEREFORE, Petitioner respectfully requests this Court take judicial notice of the attached filings.

Respectfully submitted,

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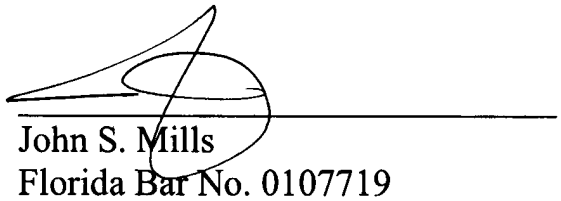

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Attorneys for Amanda Jean Hall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by e-mail[1] this 25th day of June, 2012:

Counsel for R.J. Reynolds Tobacco Co.
Robert B. Parrish – rbp@mppkj.com
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[1] The parties have agreed to accept service by email at the email addresses listed above in lieu of U.S. Mail and have further agreed that electronic service will be deemed service by mail for purposes of Fla. R. App. 9.420(e).

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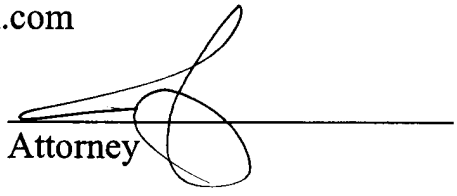

Attorney

IN THE CIRCUIT COURT, FIRST
JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

CASE NO.: 2007 CA 3020

FINNA CLAY, as Personal Representative of the Estate of Janie May Clay, deceased,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY, and LIGGETT GROUP, LLC

Defendants.

_____/

ORDER DENYING PLAINTIFF'S MOTION TO DETERMINE THE SUFFICIENCY OF DEFENDANTS' SUPERSEDEAS BONDS TO EFFECT A STAY PENDING APPEAL

This cause came before the Court for hearing on January 4, 2011, on Plaintiff's Motion to Determine the Sufficiency of Defendants' Supersedeas Bonds to Effect a Stay Pending Appeal. The Court having reviewed the motion, the Defendants' response, and the Attorney General's submission, concludes as follows:

1. The dispositive issue is whether section 569.23(3), Florida Statutes (2010), is either an unconstitutional special law or a violation of the constitutional separation of powers.

2. The Court's analysis must begin with the fact that any statute is presumed constitutional. The burden is on the opponent to demonstrate unconstitutionality.

3. Because its public purpose is evident, section 569.23(3) is a general law and not a special law.

4. While section 569.23(3) does impact somewhat on court procedures, because it involves a cap on supersedeas bonds, it does not violate the separation of powers under the

holding in *BDO Seidman, LLP v. Banco Espirito Santo International, Ltd.*, 998 So. 2d 1 (Fla. 3d DCA 2008).

It is, therefore, ORDERED AND ADJUDGED that the Plaintiff's motion, to the extent that Plaintiffs request the Court to hold Section 569.23(3) unconstitutional, is denied, and it is further ORDERED that the bonds posted by the Defendants are sufficient.

DONE and ORDERED this 18th day of January, 2011, at Escambia County.

\S\ TERRY TERRELL

TERRY D. TERRELL
Circuit Judge

cc: All counsel of record

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850) 488-6151

April 12, 2011

CASE NO.: 1D10-5544
L.T. No. : 2007 CA 3020

R. J. Reynolds Tobacco Company And Liggett Etc:	v.	Finna Clay, As Personal Representative Etc.
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

The motion to file an amicus curiae brief filed on April 4, 2011, is denied.

Upon consideration of appellee's motion for review filed on February 21, 2011, the trial court's January 18, 2011, order denying motion to determine sufficiency of bond is affirmed. See BDO Seidman, LLP v. Banco Espirito Santo International, Ltd., 998 So. 2d 1 (Fla. 3d DCA 2008).

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Stephanie E. Parker	Larry Hill	John M. Walker
John F. Yarber	Karen H. Curtis	Louis F. Hubener, I I I
Charles F. Beall, Jr.	William W. Large	Scott D. Makar
Kelly Anne Luther	Gregory J. Philo	David J. Sales
William A. Norton	John S. Mills	Hon. Ernie Lee Magaha, Clerk

am

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL · FIRST DISTRICT · STATE OF FLORIDA

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850) 488-6151

September 27, 2011

CASE NO.: 1D10-5544
L.T. No. : 2007 CA 3020

R. J. Reynolds Tobacco Company And Liggett Etc. v. Finna Clay, As Personal Representative Etc.

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellee's motion to certify a question of great public importance or for clarification filed on August 1, 2011, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Louis F. Hubener, I I I
John F. Yarber
Kelly Anne Luther
Gregory G Katsas
Gregory J. Philo
William A. Norton
Michael P. Rosenstein
Karen H. Curtis
Larry Hill
John M. Walker
Brian R. Denney
John S. Mills
Scott D. Makar
Charles F. Beall, Jr.
Stephanie E. Parker
T. Hardee Bass
David J. Sales

am

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL SAT CITO SI RECTE FIRST DISTRICT STATE OF FLORIDA

Exhibit C

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-0950

JON S. WHEELER
CLERK OF THE COURT

(850) 488-6151

April 20, 2012

Hon. Ernie Lee Magaha, Clerk
Attn: Appeals Division
P.O. Box 333
Pensacola, FL 32591-0333

RE: R. J. Reynolds Tobacco Company and Liggett etc. v. Finna Clay, as Personal Representative etc.
Docket No: 1D10-5544
Lower Tribunal Case No.: 2007 CA 3020

Dear Mr. Magaha:

I have been directed by the court to issue the attached mandate in the above-styled cause. It is enclosed with a certified copy of this Court's opinion.

Yours truly,

Jon S. Wheeler

Jon S. Wheeler
Clerk of the Court

JSW/jm
Enclosures
c: (letter and mandate only)

Karen H. Curtis
Donald B. Ayer
Louis F. Hubener, I I I.
A.A.G.
Stephanie E. Parker
John S. Mills
T. Hardee Bass
Scott D. Makar, Solicitor General
Michael P. Rosenstein
Kelly Anne Luther
John F. Yarber
David J. Sales
William A. Norton
Larry Hill
Charles F. Beall, Jr.
Gregory G. Katsas
John M. Walker
Brian R. Denney

Exhibit D

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

To the Honorable Judges of the Circuit Court for Escambia County

WHEREAS, in the certain cause filed in this Court styled:

R. J. REYNOLDS TOBACCO COMPANY AND LIGGETT ETC. **Case No : 1D10-5544**

v. **Lower Tribunal Case No : 2007 CA 3020**

FINNA CLAY, AS PERSONAL REPRESENTATIVE ETC.

The attached opinion was issued on January 25, 2012.

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable Robert T. Benton, II, Chief Judge
of the District Court of Appeal of Florida, First District,
and the Seal of said Court done at Tallahassee, Florida,
on this 20th day of April 2012.

DISTRICT COURT OF APPEAL · 1ST DCA 300 S. CHO STREET · FIRST DISTRICT · STATE OF FLORIDA

JON S. WHEELER, Clerk
District Court of Appeal of Florida, First District

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

FINNA A. CLAY, as Personal Representative of the Estate of Janie Mae Clay, Deceased,

Plaintiff,

v. CASE NO. 2008 CA 3020

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants.
_____/

DEFENDANT'S MOTION TO CONFIRM STAY OF EXECUTION

Defendant R.J. Reynolds Tobacco Company respectfully moves this Court to confirm that the stay of execution on the judgment in this case that Reynolds obtained by filing a supersedeas bond with the clerk of the Florida Supreme Court in accordance with the Florida bond statute, § 569.23, Florida Statutes, remains in place. On the afternoon of Friday, May 25, just before the Memorial Day long weekend, Plaintiff's counsel sent Reynolds a letter demanding payment of the judgment and threatening to take steps to execute against Reynolds' bond if payment is not received by June 1. Plaintiff made this threat despite knowing that Reynolds' time to file a petition for certiorari in the Supreme Court of the United States has not run, and that Reynolds has filed the bond required under § 569.23(3)(b) to stay execution pending certiorari review.

Plaintiff concedes that Reynolds had properly secured a stay under the Florida bond statute pending the completion of its appeals in the Florida appellate courts.

Plaintiff further concedes that Reynolds has done everything necessary under the Florida bond statute to secure a stay that will become effective when and if it files a petition for certiorari. Nonetheless, Plaintiff contends that the Florida bond statute affords Reynolds no protection from execution between those two stages of the appellate process, while Reynolds considers its certiorari options and prepares any petition. For the reasons set out below, Plaintiff is wrong. The Florida bond statute does not contain such an arbitrary and inexplicable coverage gap. A gap of that kind would render the stay meaningless during United States Supreme Court review that even the Plaintiff agrees the statute provides.

BACKGROUND

A. The Statutory Bond Cap

In 1995, the State of Florida sued several major United States cigarette manufacturers, including R.J. Reynolds Tobacco Company, for billions of dollars of healthcare costs allegedly paid by the State and attributable to smoking. Fla. Senate Staff Analysis, S.B. 2198, Apr. 23, 2009, at 2 ("2009 Staff Analysis"). Reynolds and three other companies settled with the State in 1997. *Id.* The ensuing Florida Settlement Agreement (FSA) obligates those companies to pay the State about $13 billion over 25 years. *Id.* The State will receive additional payments in perpetuity. *Id.*; *see* Fla. Senate Staff Analysis, S.B. 2826, Apr. 18, 2003, at 2 ("2003 Staff Analysis"). These payments fund various important public programs throughout the State. *See* § 569.21, Fla. Stat. (2011).

The *Engle* litigation has prompted the Legislature to adopt three bond-cap statutes designed to prevent adverse judgments from disrupting the State's FSA revenue stream while the appellate process is still running its course. *See* § 768.733(1), Fla. Stat. (enacted in 2000); § 569.23(2), Fla. Stat. (2003); § 569.23(3), Fla. Stat. (2009). As explained in detail below, each of those statutes provides for a continuous stay of execution upon posting of adequate security through the completion of all appellate review, including certiorari review by the Supreme Court of the United States. The most recent of these statutes, which is directly at issue here, responds to the threat posed by the aggregate impact of numerous individual judgments following the decertification of the *Engle* class action. *See Engle v. Liggett Grp.., Inc.*, 945 So. 2d 1246 (Fla. 2006). Given the extent of the ensuing *Engle* progeny litigation, the Legislature realized that, even if no individual judgment would likely threaten FSA payments, the *Engle* progeny litigation as a whole could do so. *See* 2009 Senate Staff Analysis at 5 (FSA signatories could "have to post supersedeas bonds in up to 3,000 separate [*Engle* progeny] cases that could cumulatively total billions of dollars"); *see also* 2009 House Staff Analysis at 3.

In response to that threat, the Legislature enacted the bond statute at issue here, which is codified at § 569.23(3).[1] Section 569.23(3) applies "[i]n civil actions against a signatory, or a successor, parent, or affiliate of a signatory, to [an FSA] brought by or on behalf of persons who claim or have been determined to be members of a former class

[1] This Court rejected a constitutional challenge to § 569.23(3) at a hearing in this very case on January 4, 2011. The First District Court of Appeal affirmed. *See Clay v. R.J. Reynolds Tobacco Co.*, No. 1D10-5544 (Fla. 1st DCA July 15, 2011). The Florida Supreme Court has granted jurisdiction to consider the constitutional question. *See Hall v. R.J. Reynolds Tobacco Co.*, No. SC11-1611 (Fla.).

that was decertified in whole or in part." § 569.23(3)(a)(1), Fla. Stat. As is indicated by the title of the act creating it, § 569.23(3) "prescrib[es] the security necessary to stay execution of judgments pending appeal in actions by certain former class action members against signatories to a tobacco settlement agreement and related entities." 2009 Fla. Sess. Law Serv. Ch. 2009-188 (C.S.S.B. 2198) (WEST). Importantly, § 569.23(3)(c) provides that the plaintiff cannot make a claim against the prescribed security "unless an appellant fails to pay a judgment . . . within 30 days after the judgment becomes final." That subsection further provides that "a judgment is 'final' following the completion of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court." *Id.*

In terms of the amount of security required to obtain a stay pending appeal, § 569.23(3) creates different bonding requirements depending on the stage of appellate review of an *Engle* progeny judgment. Section 569.23(3)(a) sets the amount of security required to obtain a stay of execution "during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts." *Id.* The amount "is equal to the lesser of the amount of the judgment to be stayed or the amount of security per judgment required based on the following tiers of judgments" determined by a sliding scale keyed to the number of judgments on appeal at any given time. *Id.* § 569.23(3)(a)(2).

Section 569.23(3)(b) in turn sets the amount of security required to obtain a stay of execution once appeals in the Florida courts have been exhausted and through completion of review by the United States Supreme Court. It provides that

> if there is no appeal or discretionary appellate review pending in a Florida court and an appellant exercises its right to seek discretionary appellate review outside of Florida courts, including a review by the United States Supreme Court, the trial court shall automatically stay the execution of the judgment in any such action during the pendency of the appeal, upon provision of security as required in this paragraph.

§569.23(3)(b)(1), Fla. Stat. The amount to continue the stay at this stage is "equal to the lesser of the amount of the judgment to be stayed or three times the security required to stay the execution of a judgment during all appellate review in Florida courts." *Id.* § 569.23(3)(b)(2).

B. Procedural History in this Case

On September 20, 2010, this Court entered judgment against Reynolds for $19,098,166.28. See Final Judgment (Ex. A). Pursuant to § 569.23(3)(a)(2), Reynolds posted a $4,669,966.85 bond with the Florida Supreme Court on October 21, 2010. *See* Florida Supreme Court, "Tobacco Legislation Appeals Bond Posted," *available at* http://www.floridasupremecourt.org/clerk/tobaccoBonds/TAB_Appeals-Bonds%20Posted011911.pdf. The First DCA affirmed this Court's judgment and then, on April 4, 2012, denied Reynolds' motion for rehearing. To continue its stay under the statute, Reynolds promptly filed a $14,009,900.55 bond, pursuant to § 569.23(3)(b)(2), on April 23, 2012. Its stay thus perfected, Reynolds is now considering whether to file a petition for certiorari in the United States Supreme Court, which is presently due on July 3, 2012. *See* U.S. Sup. Ct. R. 13.1.[2]

[2] "For good cause," Reynolds can receive an extension "for a period not exceeding 60 days." U.S. Sup. Ct. R. 13.5.

On May 25, 2012, Plaintiff's counsel wrote a letter demanding immediate payment of the judgment. *See* Demand Letter (Ex. B). In that letter, Plaintiff asserts that no stay applies because Florida appellate proceedings have run their course, but Reynolds has not yet filed any petition for certiorari. *See id.* at 2. Plaintiff threatens that, if payment is not received by June 1, 2012, she will "begin executing on the judgment starting with the bond." *Id.*

Reynolds therefore moves this Court to confirm that the stay of execution remains in place until 30 days after any proceedings in the Supreme Court of the United States have run their course.

ARGUMENT

I. BY STATUTE, THE EXECUTION OF THE JUDGMENT IS STAYED DURING THE PERIOD TO PETITION TO THE U.S. SUPREME COURT

The Florida Legislature created a bonding process that allows *Engle* progeny defendants to obtain a seamless stay through the end of the entire appellate process, including not only direct appeals in the Florida appellate courts, but also certiorari review in the United States Supreme Court. That conclusion follows from the governing statutory text, the purpose of the statute, and the canon against surplusage.

A. The Statutory Text Establishes that Reynolds Is Entitled to a Continuous Stay Through Disposition of a Petition for Certiorari

The text and structure of § 569.23(3) direct that the stays obtained under the statute last continuously until the end of all appellate review, including review by the Supreme Court of the United States.

1. Section 569.23(3)(c) Supports A Continuous Stay

Under § 569.23(3)(c), Plaintiff cannot bring her threatened claim against the bond until "30 days after the judgment becomes final." And the judgment does not become "final" until "the completion of all appeals . . . , including reviews by the United States Supreme Court." *Id.*[3] In other words, Reynolds' bond continues to stay the judgment, and is not subject to execution, until all appellate review – including certiorari review by the United States Supreme Court – is complete. This case is not final within the statute's meaning.

2. Sections 569.23(3)(a) & (b) Support A Continuous Stay

Sections 569.23(3)(a) & (b) —the provisions governing the bond amount that an *Engle* progeny defendant must post during each stage of the appellate process—confirm that Reynolds' stay is continuous through completion of all appellate review.

Section 569.23(3)(a)(1) provides for a stay "during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts." Section 569.23(3)(b)(1) in turn provides for a stay "if there is no appeal or discretionary appellate review pending in a Florida court and an appellant exercises its right to seek discretionary appellate review outside of Florida courts, including a review by the United States Supreme Court."

---

[3] The full text of § 569.23(3)(c), Fla. Stat. provides as follows:

> A claim may not be made against the security provided by an appellant unless an appellant fails to pay a judgment . . . within 30 days after the judgment becomes final. For purposes of this subsection, a judgment is 'final' following the completion of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court.

It is settled law that "[a] subsection of a statute cannot be read in isolation." *Lamar Outdoor Adver. —Lakeland v. Fla. Dep't of Transp.*, 17 So. 3d 799, 802 (Fla. 1st DCA 2009). Rather, "it must be read 'within the context of the entire section in order to ascertain legislative intent for the provision' and each statute 'must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.'" *Id.* (quoting *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008)). Read together, subsections (3)(a) and (3)(b) make clear that the Legislature intended to provide *Engle* progeny defendants with a seamless stay through the completion of the entire appellate process. In other words, § 569.23(3)(b) picks up where § 569.23(3)(a) leaves off.

3. Other Statutes That Are *In Pari Materia* Support A Continuous Stay

Two other statutes relating to stays of judgments enacted in response to *Engle* reinforce the conclusion that § 569.23(3) creates a continuous stay.

First, § 569.23(2), a 2003 bond cap likewise enacted in response to *Engle*, creates a continuous stay throughout all levels of appellate review:

> In any civil action involving a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement, the security to be furnished *during the pendency of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court*, of any judgment in such litigation . . . shall not exceed $100 million for all appellants collectively, regardless of the total value of the judgment.

§ 569.23(2), Fla. Stat. (emphasis added). This statute must be read as *in pari materia* with respect to § 569.23(3). As the Florida Supreme Court has explained, "statutes which relate to the same or to a closely related subject or object are regarded as *in pari materia*

and should be construed together and compared with each other." *Ferguson v. State,* 377 So. 2d 709, 710 (Fla. 1979); *see also Katherine's Bay, LLC v. Fagan*, No. 1D10-939, 2010 WL 5072509, at *8 (Fla. 1st DCA Dec. 14, 2010) ("Another rule of construction . . . is that all provisions on related subjects be read *in pari materia*."). Like § 569.23(3), § 569.23(2) applies to civil judgments against the FSA signatories or related corporate entities. And the motivation for the two bond caps was identical—concern about the threat to the FSA revenue stream from the cumulative "cost of dozens of individual lawsuits and class action suits." 2003 Senate Staff Analysis at 3.

The same is true regarding the 2000 bond cap, § 768.733, Florida Statutes, which likewise was passed in response to *Engle* but applies to all defendants subject to punitive damages in class actions. This bond cap was a direct response to concerns that a class-wide punitive-damages judgment in *Engle* would be un-bondable and thus would impair the *Engle* defendants' ability to make FSA payments prior to the completion of appellate review. *See* H.R. Final Analysis of CS/HB 1721 (2000) Staff Analysis at 4 (final July 13, 2000) ("there is concern by some that the companies may declare bankruptcy and default on their obligations"). Section § 768.733 provides that "[i]n any civil action that is brought as a certified class action, the trial court, upon the posting of a bond or equivalent surety as provided in this section, shall stay the execution of any judgment or portion thereof, entered on account of punitive damages *pending completion of any appellate review* of the judgment." § 768.733(1), Fla. Stat. (emphasis added). "Pending" means "throughout the continuance of" or "while awaiting." Black's Law Dictionary (9th ed.

2009).[4] This statute as well thus creates a seamless stay throughout the continuance or while awaiting the completion of all appeals.

There is no plausible basis for creating a gap in stay coverage under § 569.23(3), despite the seamless coverage under the two other *Engle*-related bond caps.

B. Plaintiff's Proposed Gap in the Stay Is Inconsistent with the Purpose of the Statute

Plaintiff's proposed interpretation of § 569.23(3) also would undermine the purpose of the statute—protecting the immense amount of public revenues to which Florida is entitled under the FSAs. This purpose is best effectuated if the statute's language is construed, consistent with its terms, as providing a stay of execution until all appellate review is complete.

"The intent of the legislature is the polestar of statutory construction." *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009). Moreover, "[i]t is well settled that in construing a statute the court should consider its history, evil to be corrected, the intention of the law-making body, subject regulated and the object to be obtained." *Englewood Water Dist. v. Tate*, 334 So. 2d 626, 628 (Fla. 1st DCA 1976) (citing *Smith v. Ryan*, 39 So. 2d 281 (Fla. 1949)). As discussed above, § 569.23(3) was enacted after the Florida Legislature determined that multiple large individual judgments against Reynolds and the other FSA signatories could become un-bondable in the aggregate, threaten the signatories' financial viability, and thereby jeopardize future FSA payments. Section 569.23(3) promotes

[4] *See also* Oxford English Dictionary—Compact Edition 2119 (1971) (defining "pending" as "hanging in suspense, suspended, not decided" and "remaining undecided, awaiting decision or settlement"); Random House Webster's Unabridged Dictionary (2d ed. 2001) (defining pending as "while awaiting; until," "in the period before the decision or conclusion of; during," and "remaining undecided; awaiting decision or settlement; unfinished").

Florida's substantive interest in the FSA revenue stream by limiting the amount of security necessary to stay execution of a judgment not yet final on appeal. That purpose would be undermined if § 569.23(3) were interpreted so that its stay would disappear during the middle of the appellate process, after review in the state system but before certiorari review. There is no reason that the Legislature, seeking to lower the otherwise applicable bonding requirements, and expressly extending the statutory stay through the completion of certiorari review in the United States Supreme Court, would have wanted the stay to lapse between state and federal appellate review.

C. Under Plaintiff's Interpretation, the Stay While a Petition for Certiorari is Pending Would Be Rendered Meaningless

Finally, Plaintiff's interpretation of § 569.23(3) would lead to an absurd result and effectively render a portion of the statute meaningless. "It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result." *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 219 (Fla. 1983); *see also Whitehead v Tyndall Fed. Credit Union*, 46 So. 2d 1033, 1036 (Fla. 1st DCA 2010) ("'A basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences.'" (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984))). Moreover, Florida courts "are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous are, and should be, disfavored." *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) (internal quotations omitted).

Under Plaintiff's view of the statute, the stay of execution of a judgment would disappear while a defendant was preparing its petition for certiorari, during which time the plaintiff could execute on the judgment. Then, under § 569.23(3)(b), the stay would spring back into effect after the filing of the petition. But after the plaintiff has collected the judgment, of course, the defendant has no use for a stay. Thus, under Plaintiff's reading, § 569.23(3)(b) would be rendered effectively meaningless. The Legislature surely did not intend such a strange and inexplicable result.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A STAY UNDER RULE 1.550(B) PENDING REYNOLDS' FILING OF A PETITION FOR A WRIT OF CERTIORARI

If this Court were to find that §569.23(3) creates a gap in its stay between state court and federal court review, the Court should exercise its authority under Florida Rule of Civil Procedure 1.550(b) to fill that gap. Rule 1.550(b) provides that "[t]he court before which an execution or other process based on a final judgment is returnable may stay such execution or other process and suspend proceedings thereon for good cause on motion and notice to all adverse parties." Here, good cause exists for a temporary stay to allow Reynolds to prepare and determine whether to file a potential petition for a writ of certiorari. There can be no dispute that if Reynolds files a petition, then it will have a stay of execution through completion of review by the United States Supreme Court and any further appellate review, if any. Protection of a party for a brief period while it perfects a stay has long been recognized as "good cause" for a 1.550(b) stay. *See also Campbell v. Jones*, 648 So. 2d 208, 208 n.1 (Fla. 3d DCA 1994) ("We note that Fla. R. Civ. P. 1.550(b) has been described as a vehicle for protecting a judgment debtor '*briefly*

while he perfects his appeal and obtains supersedeas.'" (emphasis in original) (quoting *Barnett v. Barnett Bank of Jacksonville, N.A.*, 338 So. 2d 888, 889 (Fla. 1st DCA 1976))); *Chapman v. Rose*, 295 So. 2d 667, 669 (Fla. 2d DCA 1974) (noting that "[i]t goes without saying that a supersedeas bond cannot instantly be obtained" and holding that appellant would have been entitled to temporary stay under Rule 1.550(b)).

CONCLUSION

For the foregoing reasons, Reynolds respectfully asks the Court to confirm that, pursuant to the bond cap statute, a stay of execution of the judgment presently remains in place and will remain in place through the completion of any certiorari review by the United States Supreme Court. In the alternative, Reynolds requests a stay of execution under Rule 1.550(b) until the due date for its U.S. Supreme Court certiorari petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing was furnished to the following by electronic delivery and United States mail this 31st day of May, 2012:

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LARRY HILL

EXHIBIT A

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

CASE NO.: 2007-CA-3020

FINNA CLAY, etc,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO CO. et al.,

Defendants.

_____/

FINAL JUDGMENT

IT IS HEREBY Ordered and Adjudged as follows:

1. That the Plaintiff FINNA CLAY, as personal representative of the Estate of Janie May Clay, and on behalf of all survivors, hereby recovers from the Defendant R.J. REYNOLDS TOBACCO COMPANY, 401 N. Main Street, Winston-Salem, North Carolina, 27102, the sum of $19,098,166.28 allocated among the estate and survivors as follows:

Estate of Janie May Clay Finna Clay, Pers. Rep. 1025 Sable Dr., Apt. B Pensacola, FL 32514	$17,004,166.28
Teddy Clay 61 Callaway Street Cantonment, FL 32533	$1,194,000.00
Jane Clay 61 Callaway Street Cantonment, FL 32533	$450,000.00
Larry Clay 61 Callaway Street Cantonment, FL 32533	$450,000.00

FOR ALL OF WHICH LET EXECUTION ISSUE.

2. That the Plaintiff FINNA CLAY, as personal representative of the Estate of Janie May Clay, and on behalf of all survivors, hereby recovers from the Defendant LIGGETT GROUP, LLC, 100 Maple Lane, Mebane, NC 27302, the sum of $1,349,694.38 allocated among the estate and survivors as follows:

Estate of Janie May Clay Finna Clay, Pers. Rep. 1025 Sable Dr., Apt. B Pensacola, FL 32514	$1,000,694.38
Teddy Clay 61 Callaway Street Cantonment, FL 32533	$199,000.00
Jane Clay 61 Callaway Street Cantonment, FL 32533	$75,000.00
Larry Clay 61 Callaway Street Cantonment, FL 32533	$75,000.00

FOR ALL OF WHICH LET EXECUTION ISSUE.

3. This judgment shall bear interest at the rate of 6%.

DONE AND ORDERED in Chambers this 30th day of September, 2010.

/S/ TERRY TERRELL

Terry David Terrell,
Circuit Judge

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RE: Clay v. R.J. Reynolds Tobacco Company and Liggett Group, LLC

Dear Counsel:

This letter is to demand payment of the judgment in the Clay case plus interest, previously negotiated trial attorney's fees and costs plus the agreed-upon interest, and appellate fees and costs. I address each item separately.

Payment of Judgment Is Due Now

Your clients' obligation to pay the judgment and attorney's fees in the Clay case is past due. If we do not receive payment by June 1, 2012, we will begin executing on the judgment, starting with the bonds.

We recognize that your clients have posted new bonds and apparently believe they are entitled to an automatic stay of the judgment until they have exhausted review in the

Supreme Court of the United States. But that is not the case here. Even under the generous terms of section 569.23, Florida Statutes. That statute states, in relevant part:

> In any action subject to this subsection, if there is no appeal or discretionary appellate review pending in a Florida court and an appellant ***exercises its right*** to seek discretionary appellate review outside of Florida courts, including a review by the United States Supreme Court, the trial court shall automatically stay the execution of the judgment in any such action during the pendency of the appeal, upon provision of security as required in this paragraph.

§ 569.23(b)1 (emphasis added).

By its plain terms, the statute only applies when a tobacco defendant "exercises" its right to seek review in the Supreme Court of the United States. The way to exercise one's right to review in that court is to file a petition for writ of certiorari. Since none has been filed, RJR and Liggett are not exercising that right. While they may be contemplating filing one down the line, the statute does not provide for a stay while the defendants consider or contemplate whether to do so.

Total Due on the Judgment With Interest

The amount that RJR will owe on the judgment as of June 1, 2012, is $21,071,560.54. The principal amount of the judgment is $19,098,166.28. As of June 1, 629 days will have passed since entry of judgment. The interest rate is six percent. Thus, as of June 1, $1,973,394.26 in interest will have accrued. The per diem amount is $3,139.42 ($3,130.85 in 2012 because it is a leap year), so RJR may deduct $3,130.85 for each day before June 1 that it tenders payment.

The amount that Liggett will owe on the judgment as of June 1, 2012, is $1,486,510.80. The principal amount of the judgment is $1,349,694.38. As of June 1, 629 days will have passed since entry of judgment. The interest rate is six percent. Thus, as of June 1, $139,462.56 in interest will have accrued. The per diem amount is $221.87 ($221.26 in 2012 because it is a leap year), so Liggett may deduct $221.26 for each day before June 1that it tenders payment.

We understand that in other recent cases, cigarette manufacturers disagreed that the interest rate remains at rate set forth in the Judgment. I trust that won't be an issue here.

Total Due for Agreed Fees and Interest

Under the April 14, 2011 Agreement, RJR is to pay $1,053,586.00 in trial level attorney's fees and costs for those fees and costs incurred up to April 14, 2011. The

interest on those fees and costs is six percent. Thus, as of June 1, $71,456.46 in interest will have accrued on that amount. The per diem amount is $173.19 ($172.71 in 2012 because it is a leap year), so RJR may deduct $172.71 for each day before June 1 that it tenders payment. As of June 1, the total amount due under that April 14, 2011 Agreement will be $1,125,042.46.

Under the April 14, 2011 Agreement, Liggett is to pay $74,450.00 in trial level attorney's fees and costs incurred up to April 14, 2011. The interest rate on those fees and costs is six percent. Thus, as of June 1, $5,069.71 in interest will have accrued on that amount. The per diem amount is $12.28 ($12.25 in 2012 because it is a leap year), so Liggett may deduct $12.25 for each day before June 1 that it tenders payment. As of June 1, the total amount due under that April 14, 2011 Agreement will be $79,817.71.

Additional Fees and Costs

Finally, Mrs. Clay is also entitled to her appellate attorney's fees and costs and any trial level fees and costs incurred since the April 14, 2011 Agreement. To date, those fees total $291,202.00. This reflects $2,770.00 in post-Agreement fees incurred by Searcy Denney, as well as $267,180.00 incurred by the Mills Firm (233.1 hours by John Mills at $800/hour, 111.0 hours by Greg Philo at $500/hour, 110.9 hours by paralegal Elizabeth Rahwan at $250/hour, and 1.3 hours by a law clerk at $150/hour), and $20,510.00 incurred by David J. Sales, P.A. (29.3 hours at $700/hour). Post-Agreement costs to date total $742.00.

If further proceedings are required to collect on the judgment or argue over issues like the stay or interest, that amount will only rise. Absent agreement to the above post-Agreement fees and costs, we will have to file a motion to determine the amount of fees and costs owed and will have to set the deposition of your clients' corporate representative to discover the hours and rate for fees they have paid their lawyers.

We look forward to receiving full payment by June 1. If you have any questions, please do not hesitate to call.

Yours truly,

JAMES W. GUSTAFSON, JR.

JWG/jbc

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

CASE NO: 2008-CA-80000

PERTAINS TO: FINNA A. CLAY, Personal Representative of the *ESTATE OF JANIE MAE CLAY v. R.J. Reynolds Tobacco Company, et al.*
CASE NO: *2007-CA-003020, DIV. B*

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO CONFIRM STAY OF EXECUTION

Plaintiff, FINNA A. CLAY Personal Representative of the ESTATE OF JANIE MAE CLAY, by and through undersigned counsel, files her Opposition to Defendants' Motion to Confirm Stay of Execution and states:

Defendants are simply wrong in their contention that Section 569.23, Florida Statues provides for an indefinite stay of execution until they make the decision whether to file a petition for writ of certiorari in the United States Supreme Court. Defendants are wrong based on the plain language of the statute, rules of statutory construction, and the rules of appellate procedure.

The plain language of Section 569.23 does not grant a stay of execution beyond thirty days after conclusion of appellate review in Florida courts.

The cigarette manufacturers' special bond statute grants them an automatic stay of execution of any judgment during the pendency of any appellate reviews in Florida courts if they post a proper supersedeas bond. Section 569.23(3)(a)1., provides, in relevant part, that:

> the trial courts shall ***automatically stay*** the execution of any judgment in any such actions during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts, upon provision of security as required in this paragraph.

(emphasis added).

Here, Defendants each posted a supersedeas bond and appealed the Final Judgment entered in this case. The First District Court of Appeal affirmed the Final Judgment on January 25, 2012. Defendants then filed a motion for rehearing or to stay issuance of the mandate on February 28, 2012. The First DCA denied those motions on April 4, 2012, and issued its mandate on April 20, 2012. The First DCA's denial of the motion for rehearing ended "the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts" as set forth in Section 569.23(3)(a)1., and started the thirty day time for Defendants to exercise their right to seek "discretionary appellate review outside the Florida courts, including a review by the United States Supreme Court."

> In any action subject to this subsection, if there is no appeal or discretionary appellate review pending in a Florida court and an appellant ***exercises its right*** to seek discretionary appellate review outside of Florida courts, including a review by the United States Supreme Court, the trial court shall automatically stay the execution of the judgment in any such action during the pendency of the appeal, upon provision of security as required in this paragraph.
>
> Section 569.23(3)(b)1. (emphasis added).

By its plain terms, the statute only applies when a tobacco defendant "exercises" its right to seek review in the United States Supreme Court. The way to exercise one's right to review in that court is to file a petition for writ of certiorari. Defendants have not filed such a petition, therefore, they are not "exercising" that right. Defendants concede this in their papers by arguing that they should have a stay ("when and if it files a petition for certiorari" and "considers its [their] options and prepares any petition."). *See* Motion at 2 (noting that the issue is whether the stay only begins "when and **if** [Reynolds] files a petition for certiorari". (emphasis added)).

Section 569.23(3)(c) provides for an extra thirty day stay of execution after a judgment becomes "final":

> A claim may not be made against the security provided by an appellant unless an appellant fails to pay a judgment in a case covered by this subsection within 30 days after the judgment becomes final. For purposes of this subsection, a judgment is "final" following the completion of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court. If an appellant fails to pay a judgment within such time period, the security for that judgment provided by that appellant shall be available to satisfy the judgment in favor of the appellee.

This subsection provided a stay of execution on the bond for thirty days after the First DCA affirmed the Judgment (or after the motion for rehearing was denied), which period has now run. It does not provide for a stay of execution from that point forward, and the plain language of Section 569.23 cannot be read to provide otherwise. It is this "within thirty days" language that gives the Defendants time to seek appellate review in the United States Supreme Court. This "within thirty days" language is the "plausible basis for creating a gap in stay coverage" that the Defendants say is missing. If they avail themselves of the right to file the certiorari petition within that time limit, then they obtain a stay until the petition is denied.

Defendants seek only to delay payment of this Judgment that has become "final" as defined in section 569.23.

Defendants' motion accuses undersigned counsel of making a "threat" to execute on the Judgment as though it were improper for Plaintiff, whose father, the widower of the decedent smoker, is now 78 years old, to demand have this judgment paid. Plaintiff did not seek to execute on the Judgment within thirty days after the Final Judgment was affirmed by the First District. Indeed, Plaintiff gave Defendants additional time before demanding that they pay up.

Undersigned counsel for the Plaintiff inquired of defense counsel on multiple occasions whether the Defendant was seeking review in the United States Supreme Court, and was told each and every time that they "would look into it" and "get back to you on that." After these repeated inquiries without a response, Plaintiff voluntarily offered not to execute on her judgment if (1) Defendants filed their petition for writ of certiorari to the United States Supreme Court within ninety days of the affirmance, and (2) indicated that they would not seek an extension of the time for filing any petition for certiorari. Defendants responded by filing the motion to confirm stay of execution. The only reason the Defendants filed this motion is because they want to reserve the right to delay payment of this judgment 150 days (ninety days plus a potential sixty day extension) while R.J. Reynolds "considers its certiorari options and prepares any petition." In arguing for an additional 30-day period after the judgment becomes final, Defendants contend that their special bond statute entitles them to refuse to comply with a judgment affirmed by Florida appellate courts for six months, even if they never seek review in the United States Supreme Court. Section 569.23 does not authorize this result.

Defendants' position begs the question: given the stay of execution on the bond for thirty days after the Judgment becomes final under Section 569.23(3)(c), how much time do they need to "consider their options?" The only issue amenable to review in the United States Supreme Court is the purported Due Process argument raised and rejected by four of the five District Courts of Appeal (the First, Second, Third and Fourth). Defendants have already briefed this issue in four earlier petitions for certiorari to the United States Supreme Court (which the court rejected), in dozens of cases already tried in this state under Engle (which the trial courts have

uniformly rejected), and recently they briefed the issue again in the Florida Supreme Court (i.e., Douglas). The legal arguments have not changed and there is no new law to complicate the evaluation of Defendants' position. The First District's per curiam affirmance in this case crystalized the Defendants' choices: pay the judgment or file a petition for writ of certiorari in the United States Supreme Court. Defendants have failed to exercise either of the available two options.

Fla.R.Civ.P. 1.550 is inapplicable and provides no relief.

Finally, the Defendants' request for a stay under 1.550(b) is without merit whatsoever. The cases cited by Defendants say the rule provides only the time needed to post the supersedeas bond. Defendants have already posted their bond. Rule 1.550(c) is therefore inapplicable here, as noted in a CLE article written by Defendants' appellate counsel, Elliott Scherker:

> It is clear, however, that a Rule 1.550(b) motion cannot be used as a substitute for a stay pending appeal. A trial court cannot enter an order delaying execution during the entire pendency of appeal, because doing so would circumvent the requirements of the rules." *Campbell*; *Barnett v. Barnett Bank of Jacksonville, N.A.*, 338 So.2d 888 (Fla. 1st DCA 1976); *see also Mellon United National Bank v. Cochran*, 776 So.2d 964 (Fla. 3d DCA 2000). Rather, the purpose of a Rule 1.550(b) motion is simply to give the appellant time to obtain a stay or post a bond, or do both, without suffering execution in the interim. *See Greenbriar Condominium As'sn, Inc. v. Padgett*, 583 So.2d 1100 (Fla. 4th DCA 1991).
>
> STAYS, APP FL-CLE 17-1 (copy attached).

WHEREFORE, Plaintiff respectfully requests this Honorable Court deny Defendants' motion to confirm stay of execution, and for such other relief that this Honorable Court deems just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to all counsel on the attached list, this 8th day of June, 2012.

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APP FL-CLE 17-1

The Florida Bar

2010
Florida Appellate Practice
Chapter 17

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Current through 7th Edition 2010

I. [§ 17.1] INTRODUCTION

This chapter addresses stays in both civil proceedings, see § § 17.2-17.45, and criminal proceedings, see § § 17.46-17.59. The term "stay" will be used generically to refer to all orders that have the effect of suspending proceedings or the effect of orders pending appellate review. Practitioners should note that "supersedeas" is synonymous with "stay" and may appear in cases and articles.

Stays in federal appeals will not be discussed in detail. While many of the concepts that apply to stays under state law are applicable to federal stays, Federal Rule of Appellate Procedure 8 and Federal Rule of Civil Procedure 62 should be consulted,

as should the local rules of the particular district and the Eleventh Circuit. See, *e.g.*, S.D.Fla.Loc.R. 62.1; M.D.Fla.Loc.R. 7.05(p); 11th Cir. Rule 8-1. Bankruptcy stays are addressed in Federal Bankruptcy Rule 8005.

II. CIVIL CASES

A. Preliminary Considerations

1. [§ 17.2] Purpose And Effect Of Stay

Filing a notice of appeal does not divest the trial court of jurisdiction to enforce the order being reviewed. *Parsons v. Whitaker Plumbing of Boca Raton*, 730 So.2d 839 (Fla. 4th DCA 1999). The fundamental purpose of a stay is to maintain the status quo in the trial court while the court's order is reviewed on appeal. *Hathaway v. Munroe*, 97 Fla. 28, 119 So. 149 (1929); *Perez v. Perez*, 769 So.2d 389 (Fla. 3d DCA 1999). If an appellant were forced to comply with an order during the appeal, the appeal might well become meaningless. On the other hand, an appellee must be assured that its victory will not be lessened or diluted by the nonenforcement of the order during an appeal. The law governing stays attempts to reconcile these competing interests. On rendition of an adverse ruling a lawyer should discuss with the client the necessity of a stay and the likelihood that a bond will be required. It is best to start the process as soon as possible, particularly when a money judgment is to be appealed, because procuring a bond can take a substantial period of time.

When a stay is obtained, the trial court cannot enforce the judgment by execution, garnishment, or other means. *City of Plant City v. Mann*, 400 So.2d 952 (Fla. 1981); *Finst Development, Inc. v. Bemaor*, 449 So.2d 290 (Fla. 3d DCA 1983). The trial court retains continuing jurisdiction to review and modify the conditions of a stay while the appeal is pending. See *Fla.R.App.P.* 9.310(a); *Hollo v. Northern Trust Bank of Florida, N.A.*, 562 So.2d 730 (Fla. 3d DCA 1990).

2. [§ 17.3] Stay Cannot Be Required; Partial Stay Permissible

A stay is not required for appellate review, and a party's right to appeal cannot be conditioned on obtaining a stay. *City of St. Petersburg v. Wall*, 475 So.2d 662 (Fla. 1985). In the absence of a stay, however, the trial court may proceed with the enforcement of the order. *Greenberg v. Carlisle*, 481 So.2d 106 (Fla. 4th DCA 1986). See § 17.2. An appeal may be dismissed if an appellant purposely fails to comply with an unstayed trial court order. *Davidson v. District Court of Appeal, Fourth District*, 501 So.2d 603 (Fla. 1987). See also *Kobayashi v. Kobayashi, 111* So.2d 951 (Fla. 2001). A victorious appellant can obtain restitution if the appellant has performed under an erroneous judgment that is subsequently reversed on appeal. *Hazen v. Smith*, 101 Fla. 767, 135 So. 813 (1931); *Mann v. Thompson*, 118 So.2d 112 (Fla. 1st DCA 1960).

An appellant may seek a stay of only a portion of the order to be reviewed; the trial court cannot force the appellant to stay the entire judgment. *Lopez-Cantera v. Lopez-Canter a*, 578 So.2d 726 (Fla. 3d DCA 1991). An appellant can therefore limit a stay request to only those portions of the order that will be altered if the appeal is successful.

3. [§ 17.4] Preventing Execution Before Entry Of Stay

Execution may issue on the resolution of posttrial motions, once the judgment is recorded. *Fla.R.Civ.P.* 1.550(a). The prevailing party could conceivably commence execution before the time expires for filing the notice of appeal. Counsel for the parties often agree informally that execution will not issue until the appellant's request for a stay is heard, or a bond is posted (in the case of a money judgment). The trial court has the power under *Rule* 1.550(b) to delay execution on the judgment, pending a bond being posted. *Campbell v. Jones*, 648 So.2d 208 (Fla. 3d DCA 1994).

Rule 1.550 should be invoked in cases in which there is a legitimate threat of immediate execution. The motion should request that execution be stayed for a brief period so that the appellant can file a notice of appeal and obtain a stay. Filing this motion may prevent the clerk from issuing execution without a court order.

It is clear, however, that a *Rule* 1.550(b) motion cannot be used as a substitute for a stay pending appeal. A trial court cannot enter an order delaying execution during the entire pendency of appeal, because doing so would circumvent the requirements of the rules. *Campbell; Barnett v. Barnett Bank of Jacksonville, N.A.*, 338 So.2d 888 (Fla. 1st DCA 1976); see also *Mellon United National Bank v. Cochran*, 776 So.2d 964 (Fla. 3d DCA 2000). Rather, the purpose *of a Rule* 1.550(b) motion is simply to give the appellant time to obtain a stay or post a bond, or do both, without suffering execution in the interim. See *Greenbriar Condominium As'sn, Inc. v. Padgett*, 583 So.2d 1100 (Fla. 4th DCA 1991).

4. [§ 17.5] Timing Of Stay

No specifed time limit is included in the rules governing stays. Because execution or other enforcement of an order may be imminent, however, under the rules discussed in § § 17.3-17.4, practical considerations dictate that stays should be sought immediately. Execution completed before the entry of a stay is not undone by the stay. *Bacon v. Green*, 36 Fla. 313, 18 So. 866 (1894); *Annot, Effect of Supersedeas or Stay on Antecedent Levy*, 90 A.L.R.2d 483 (1963).

5. [§ 17.6] Alternatives To Stay

An appellant may, of course, choose not to seek a stay, at least until it can be determined whether opposing counsel will vigorously pursue execution or enforcement while the appeal is pending. It is always possible to seek a stay at a later time in the appellate proceedings. Delaying a request for a stay poses hazards, however, especially if a money judgment is involved. *Ronette Communications Corp. v. Lopez*, 475 So.2d 1360 (Fla. 5th DCA 1985); see also *Sundie v. Haren*, 253 So.2d 857 (Fla. 1971).

The bond premium is ataxable cost that the appellant can recover from the appellee if reversal is obtained. *Fla.RApp.P.* 9.400(a)(3); *F.S.* 57.071(1); *Florida Power & Light Co. v. Polackwich*, 705 So.2d 23 (Fla. 2d DCA 1997); *Melvin v. West*, 120 So.2d 233 (Fla. 2d DCA 1960), 90 A.L.R.2d 443; but see *Lone Star Industries, Inc. v. Liberty Mutual Insurance Co.*, 688 So.2d 950 (Fla. 3d DCA 1997) (costs for bond not available when insurer posted its own bond). Even so, it is rarely prudent for an appellee to refrain from seeking execution or other enforcement pending an appeal.

Parties occasionally structure their own stay arrangement outside the confnes of *Rule* 9.310. For example, it is common to use an irrevocable letter of credit as a substitute for a bond. See, *e.g.*, *Citizens & Peoples National Bank of Pensacola v. Futch*, 650 So.2d 1008 (Fla. 1st DCA 1995). An appellee should enter into these arrangements with caution, however, because there is always the potential for complications. If an appellee is inclined to enter into this arrangement with the appellant, the appellee should insist that the stay agreement be approved by the trial court and subjected to the court's jurisdiction and oversight.

6. [§ 17.7] Duration Of Stay

Under *Fla.R.App.P.* 9.310, a stay remains in effect until the reviewing court issues its mandate, which normally occurs 15 days after the court's decision becomes final. See *Rule* 9.340; *Perez v. Perez*, 769 So.2d 389 (Fla. 3d DCA 1999). Filing a notice to invoke the discretionary jurisdiction of a higher court does not bar issuance of the mandate or expiration of the stay. See § 17.34.

B. Procedure For Obtaining Stay

1. [§ 17.8] Motion In Trial Court

Fla.R.App.P. 9.310(a) provides that an initial application for a stay is to be made by a motion in the trial court, *i.e.*, to the court or administrative body that rendered the order to be reviewed. As a general rule, the motion should not be filed initially in the appellate court, except when the trial court is not available to hear the motion in a timely manner, *Mitchell v. Leon County School Board*, 591 So.2d 1032 (Fla. 1st DCA 1991), or when a mandate has issued and review is pending in the Supreme Court, *State v. Roberts*, 661 So.2d 821 (Fla. 1995), *quashed on other grounds* 677 So.2d 264.

In ruling on a stay motion, the trial court should consider

- the likelihood of success on appeal;
- the harm that would be suffered by the appellant if a stay is not granted; and
- the harm that could be suffered by the appellee if a stay is granted.

State ex rel. Price v. McCord, 380 So.2d 1037 (Fla. 1980); *Perez v. Perez*, 769 So.2d 389 (Fla. 3d DCA 1999). The moving party should have a court reporter present to ensure effective review of an adverse ruling. If a stay is granted, the trial court can require a bond to be posted and impose other conditions. *Rule* 9.310(c). See § 17.18.

Although there is no requirement that a notice of appeal be filed before the stay motion, it is better to file the notice before the hearing on the motion so that there will be no doubt about the moving party's intention to appeal. If no notice of appeal has been filed before the hearing, the order granting the stay will likely be conditioned on the timely filing of the notice of appeal.

2. [§ 17.9] Form For Motion For Stay

IN THE ___(Trial Court)___
Case No. ___

___
Plaintiff,
vs.

___
Defendant.

MOTION FOR STAY PENDING REVIEW

Defendant, ___, asks this court, under Florida Rule of Appellate Procedure 9.310, to enter an order staying execution on the judgment ren dered on ___ (date)___ for the following reasons:

1. Defendant ___intends to appeal/has fled a notice of appeal___ from the judgment rendered by this court on ___(date)___

2. **A stay of execution is necessary to prevent a change of the status quo and to provide meaning to defendant's appeal.**

3. **[List other specifc reasons for requesting a stay.]**

WHEREFORE, defendant respectfully asks this court to enter an order staying execution on the judgment rendered on ... ___(date)___

I certify that a copy hereof has been furnished to ___ by ___ (U.S. Mail/Facsimile/Email)___ on ___(date) ___

___
Attorney for Defendant

___(address and phone number)___ Florida Bar No. _____

COMMENT: The rules do not prescribe a particular form for a motion for stay. It is permissible to attach an appendix to the motion containing relevant documents, affdavits, and other papers. See *Fla.R.App.P.* 9.220.

3. [§ 17.10] Conditions Of Stay Order

A trial court has "considerable latitude" in determining stay conditions. *Pabian v. Pabian*, 469 So.2d 189, 191 (Fla. 4th DCA 1985). Conditions should be tailored to protect the appellee while the appeal is pending. See *Lawson v. County Board of Public Instruction, Franklin County ex rel. Alford*, 114 Fla. 153, 154 So. 170 (1934); *Labell v. Campbell*, 99 Fla. 1125, 128 So. 422 (1930).

Only a few cases deal with the limits of a trial court's discretion to impose conditions. A trial court may not require an appellant to pay an appellee's attorney's fees as a condition of a stay, unless payment is otherwise authorized by statute or contract. *Kennedy v. Practical Home Builders*, 42 So.2d 278 (Fla. 1949); *Finston v. Finston*, 41 So.2d 549 (Fla. 1949); *In re Forfeiture of One 1980 53 Foot Hatteras Vessel*, 642 So.2d 1106 (Fla. 4th DCA 1994); *City of Coral Gables v. Geary*, 398 So.2d 479 (Fla. 3d DCA 1981). In a mortgage foreclosure action, a trial court may not require the appellant to pay a future defciency judgment. *Holgate v. Jones*, 93 Fla. 269, 111 So. 626 (1927). Nor may the trial court impose conditions that circumvent other provisions of the appellate rules. *Jenkins Trucking, Inc. v. Emmons*, 207 So.2d 280 (Fla. 3d DCA 1968).

4. [§ 17.11] Bond Required By Stay Order

If the judgment appealed is "solely for the payment of money," an appellant is entitled to an automatic stay upon posting the specifed bond. *Fla.R.App.P.* 9.310(b)(1); *F.S.* 45.045(1). *F.S.* 45.045(2), codifying *Platt v. Russek*, 921 So.2d 5 (Fla. 2d DCA 2004), grants trial courts discretionary authority to stay money judgments on conditions that vary from those required for an automatic stay under *Rule* 9.310(b)(1) and *F.S.* 45.045(1). See § 17.13 for more discussion *of F.S.* 45.045(2) and *Platt*. A trial court is authorized by *Rule* 9.310 to require an appellant to post a bond to protect the appellee from injury incurred as a result of the stay when appeals are taken from nonmonetary judgments or orders. The purpose of such a bond is to protect the party in whose favor judgment was entered by ensuring that the judgment will be complied with if it is affrmed. *Cohn v. Reiss*, 615 So.2d 173 (Fla. 4th DCA 1993); *Pabian v. Pabian*, 469 So.2d 189 (Fla. 4th DCA 1985). The failure to require a bond as a condition of the stay can be an abuse of discretion. *Makowski v. Makowski*, 578 So.2d 737 (Fla. 3d DCA 1991); see also *Mellon United National Bank v. Cochran*, 776 So.2d 964 (Fla. 3d DCA 2000). The specifcs of the bond requirements are discussed in § § 17.37-17.45.

5. [§ 17.12] Form For Order Granting Stay

(Party Designation)
(Title of Court)

ORDER GRANTING STAY PENDING REVIEW

The court having conducted a hearing on defendant's motion for stay, and having considered the evidence and argument of counsel, it is

ORDERED that execution of the judgment is stayed for a period of ___ days from this date, during which time defendant must give a good and suffcient bond in the amount of $___ conditioned on the following: _____ On the posting of a bond in full conformance with Florida Rule of Appellate Procedure 9.310(c) or Florida Statute 45.045, execution will be stayed pending review until the mandate issues.

ORDERED at _____, Florida, on ___(date)___

(Title of Offce)

Copies furnished to: _____

C. Automatic Stay Of Money Judgment

1. [§ 17.13] In General

The requirements for posting a bond to obtain an automatic stay of execution pending appeal of a money judgment are governed by *Fla.R.App.P.* 9.310(b)(1) and *F.S.* 45.045(1). *F.S.* 45.045(1) establishes a $50 million statutory cap on supersedeas bonds in civil cases. Before the Legislature enacted *F.S.* 45.045 in 2006, the District Court of Appeal, Third District, had interpreted *Rule* 9.310(b)(1) as the exclusive method by which to stay a money judgment. See, *e.g.*, *Campbell v. Jones*, 648 So.2d 208 (Fla. 3d DCA 1994). The Third District has since upheld the constitutionality of the $50 million bond cap set forth in *F.S.* 45.045(1). *BDO Seidman, LLP v. Banco Espirito Santo International, Ltd.*, 998 So.2d 1 (Fla. 3d DCA 2008), *rev. den.* 996 So.2d 211 (once $50 million bond is posted, judgment is automatically stayed and discovery in aid of execution is precluded).

In interpreting *Fla.R.App.P.* 9.310, the District Court of Appeal, Second District, concluded that trial courts have the discretion to grant a stay of a money judgment "on conditions that vary from those required for an automatic stay under rule 9.310(b)(1)." *Platt v. Russek*, 921 So.2d 5, 8 (Fla. 2d DCA 2004). *F.S.* 45.045(2) also allows a judgment debtor to seek a reduced bond, subject to discovery in connection with such a request, and for increasing the bond upon a finding that the judgment debtor has dissipated assets outside of the ordinary course of business, *F.S.* 45.045(3)-(4).

When a party posts a bond in the amount required for an automatic stay under *Rule* 9.310(b)(1) or *F.S.* 45.045(1), there is no need to file a motion in the trial court. *Palm Beach Heights Development & Sales Corp. v. Decillis*, 385 So.2d 1170 (Fla. 3d DCA 1980). For bonds posted under *Rule* 9.310(b)(1), the trial court has no discretion to change the amount of the bond or otherwise alter the automatic stay if the judgment is purely for the payment of money . *Campbell; Proprietors Insurance Co. v. Valsecchi*, 385 So.2d 749 (Fla. 3d DCA 1980). But see *Platt*. The Third District has held, however, that bonds posted under *F S.* 45.045(1) may be subject to discovery under *F.S.* 45.045(3) "to the extent that the trial court determines that the discovery sought is '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,"' which, in turn, supports a bond requirement beyond the statutory cap. *BDO Seidman, LLP v. Banco Espirito Santo International, Ltd.*, 26 So.3d 1, 3 (Fla. 3d DCA 2009). The court cautioned "[o]f course, section 45.045(3) should not be read as authorization for an unfettered fishing expedition through an appellant's records, which would amount to no more than discovery in aid of execution." *Id.*

2. [§ 17.14] Money Judgment Defined

Fla.RApp.P. 9.310(b)(1) states that the automatic stay arises only when the judgment is "solely for the payment of money." When a judgment grants both monetary and nonmonetary relief, the automatic stay does not apply. *Florida Coast Bank of Pompano Beach v. Mayes*, 433 So.2d 1033 (Fla. 4th DCA 1983).

The cases are not entirely consistent as to what constitutes a money judgment for purposes of the rule. An order directing disbursement of a specifc fund *(e.g.*, garnishment) is not a money judgment within the meaning of the rule. *Zuckerman v. Hofrichter & Quiat, P.A.*, 622 So.2d 1 (Fla. 3d DCA 1993), *quashed on other grounds* 646 So.2d 187; *Wilson v. Woodward*, 602 So.2d 545 (Fla. 2d DCA 1991). A judgment foreclosing a mortgage has also been held not to be a money judgment. *Holgate v. Jones*, 93 Fla. 269, 111 So. 626 (1927); *Begonia Corp. v. NAM Financial Corp.*, 724 So.2d 714 (Fla. 4th DCA 1999); *Cerrito v. Kovitch*, 406 So.2d 125 (Fla. 4th DCA 1981). A final judgment of dissolution of marriage finding a special equity is not a money judgment. *Green v. Green*, 254 So.2d 802 (Fla. 3d DCA 1971). A final judgment of dissolution of marriage ordering the former husband to pay periodic and lump sum alimony and child support is a money judgment, at least when the former husband challenges only the lump sum award on appeal. *Knipe v. Knipe*, 290 So.2d 71 (Fla. 2d DCA 1974). A judgment ordering a trustee to pay income to the benefciaries and perform other nonmonetary acts is not a money judgment within the meaning of

the rule. *Florida Coast Bank of Pompano Beach*. An order holding an ex-husband in contempt for not making support payments is not a money judgment. *Pabian v. Pabian*, 469 So.2d 189 (Fla. 4th DCA 1985); see also *Garcia v. Garcia*, 743 So.2d 1225 (Fla. 4th DCA 1999). But an order in an equity action imposing sanctions in the form of a sum certain is considered a money judgment for purposes of the rule. *Begonia Corp.*

It can be helpful to consult *Fla.RCiv.P.* 1.570, pertaining to the enforcement of judgments, because only "money judgments" under subdivision (b) *of Rule* 9.310 are eligible for the automatic stay. *Garcia*. The above cases demonstrate that, in many instances, a judgment requiring monetary payment may not be considered a judgment solely for the payment of money under *Rule* 9.310(b)(1). If there is any doubt, it is wise to file an appropriate motion and seek an order setting the terms of a stay.

3. [§ 17.15] Amount Of Bond

Under *Fla.R.App.P.* 9.310(b)(1), an appellant is required to post a bond in the amount of the judgment, plus twice the legal rate of interest. As discussed in § 17.13, however, bonds in civil cases are capped at $50 million, pursuant to *F.S.* 45.045(1). The trial court has no power to vary the amount of the bond required for the automatic stay of a money judgment posted pursuant to *Rule* 9.310(b)(1). *Taplin v. Salamone*, 422 So.2d 92 (Fla. 4th DCA 1982). But see *BDO Seidman, LLP v. Banco Espirito Santo International, Ltd.*, 26 So.3d 1, 3, n.2 (Fla. 3d DCA, 2009) *(F.S.* 45.045(3) provides a narrow avenue for discovery "for the limited purpose of demonstrating a diversion or dissipation that could support an increase in a bond beyond *[F.S.* 45.045(l)' s] statutory cap").

The amount of the judgment for purposes of the automatic stay is usually, but not always, ascertainable from the face of the judgment. If a portion of the judgment is covered by funds deposited in the registry of the court, the appellant need not bond that amount. *Wilson v. Woodward*, 602 So.2d 545 (Fla. 2d DCA 1991); *Mosar Developers, Inc. v. Creech & Wilson, Inc.*, 404 So.2d 118 (Fla. 4th DCA 1981).

The legal rate of interest on judgments is set forth in *F.S.* 55.03. The legal rate is subject to change every year. Rate information is available online at www.myfloridacfo.com/aadir/interest.htm. Practitioners may also want to consult with the clerk's offce to determine the legal rate of interest and advise the bonding company issuing the bond to verify that rate. Determining the legal rate of interest can have its own vexations, depending on when the judgment was entered and whether the judgment is based on a contract specifying an interest rate. *Whitehurst v. Camp*, 699 So.2d 679 (Fla. 1997).

4. [§ 17.16] Bonds Covering Only Portion Of Money Judgment

Case law interpreting an earlier version of *Fla.RApp.P.* 9.310(b)(1) held that a party can stay a money judgment, as it pertains to that particular party, by filing a bond for only the portion of the judgment for which the party is liable. *Fallon v. Biddy*, 376 So.2d 908 (Fla. 2d DCA 1979); *Fitzgerald v. Addison*, 287 So.2d 151 (Fla. 2d DCA 1973). The pertinent language *of Rule* 9.310(b)(1) was changed slightly in 1984, but the Committee Notes make it clear that a party may still obtain a stay by posting a bond for only that portion of the judgment for which the party is liable.

This issue of the partial bonding of a judgment arises most often when the judgment is in excess of the defendant's insurance limits. *Rule* 9.310(b)(1) states that the amount of the bond must include twice the statutory rate "on the total amount on which the party has an obligation to pay interest." If an insurer's policy requires it to be liable for interest on the whole judgment, even though the judgment is greater than the policy limits, the insurer must post a bond covering the total interest plus the portion of the judgment for which it is liable. The Committee Notes suggest that the determination of the amount of the insurer's bond may require a hearing. The notes further observe that an insured may stay the judgment as it applies to the insured by posting a bond for the portion of the judgment that is not stayed by the insurer's bond.

Another unique problem for insurers arises from the "nonjoinder statute," *F.S.* 627.4136. That statute prohibits a plaintiff from naming a liability insurer as a party to the lawsuit against the insured. If the lawsuit results in an excess judgment against the insured, the liability insurer may choose to bond only the portion of the judgment that is within its policy limits. Because *Rule* 9.310(b)(1) allows only a "party" to stay a judgment, it could be argued that the rule does not apply to a nonparty liability insurer. The solution to this technical dilemma is to make the liability insurer a party after entry of the judgment. *F.S.* 627.4136(4) allows a liability insurer to be made a party "[a]t the time a judgment is entered or a settlement is reached during the pendency of litigation." Once the liability insurer is a party, it may invoke *Rule* 9.310(b)(1).

D. Automatic Stay For Public Bodies And Offcers

1. [§ 17.17] In General

Fla.RApp.P. 9.310(b)(2) provides that the filing of a notice of appeal by "the state, any public offcer in an offcial capacity, board, commission, or other public body" acts as an automatic stay without the necessity of the posting of a bond, "except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by Chapter 120, Florida Statutes." See *Fouts v. Bolay*, 769 So.2d 504 (Fla. 5th DCA 2000) (appeal must be filed by "public offcial *in his official capacity seeking to enforce some public right*" [emphasis in original]). Note that when dealing with appeals in "public records and public meeting" cases, the automatic stay exists for only 48 hours after the filing of the notice of appeal. On motion, however, the trial court may extend a stay, impose any lawful conditions, or vacate the stay. *Id.*

The automatic stay does not authorize a public body to ignore a prohibitory injunction while an appeal is pending, at least not without specifc authorization from the trial court. *Powell v. Florida Land & Improvement Co.*, 41 Fla. 494, 26 So. 700 (1899); *City of Miami v. Cuban Vill-Age Co.*, 143 So.2d 69 (Fla. 3d DCA 1962). The automatic stay does authorize the public body not to comply with a mandatory injunction. *Id.*

2. [§ 17.18] When Bond Can Be Required

Fla.R.App.P. 9.310(b)(2) gives the trial court the power to vacate the automatic stay pertaining to public bodies and offcers, or to impose conditions on the continuance of the stay. In *City of Lauderdale Lakes v. Corn*, 415 So.2d 1270 (Fla. 1982), the Supreme Court held that the trial court can impose a bond only when the judgment concerns operational-level functions of the public body; it may not require a public body or offcer to post a bond when the judgment concerns planning-level functions. See also *Dept. of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 532 So.2d 1294 (Fla. 2d DCA 1988). The distinction between planning and operational functions originates from *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979), and that case and its progeny should be consulted in making this sometimes diffcult distinction.

In *City of St. Petersburg v. Wall*, 475 So.2d 662 (Fla. 1985), the court held that the city's right to appeal could not be conditioned on the posting of a bond. The continuation of the automatic stay, however, may be conditioned on the posting of a bond or, alternatively, the government body could be held accountable for damages caused to the appellee during the pendency of the appellate proceedings. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

3. [§ 17.19] When Automatic Stay Can Be Vacated

The power to vacate a public body's automatic stay is discretionary with the trial court, but should be exercised "only under the most compelling circumstances." *St. Lucie County v. North Palm Development Corp.*, 444 So.2d 1133, 1135 (Fla. 4th DCA 1984). In *Dept. of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 532 So.2d 1294 (Fla. 2d DCA 1988), the court upheld the partial vacatur of an automatic stay when the government body conceded that, even if it prevailed on appeal, it would still owe the appellee the portion of the judgment that was released from the automatic stay.

4. [§ 17.20] Automatic Stay Pending Discretionary Review By Florida Supreme Court

Fla.R.App.P. 9.310(e) provides that a stay shall remain effective "during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modifed or vacated." The automatic stay thus terminates on the issuance of the mandate by a district court of appeal, and would not be perpetuated automatically while the government body seeks discretionary review in the Florida Supreme Court. *City of Miami v. Arostegui*, 616 So.2d 1117 (Fla. 1st DCA 1993), *quashed in part on other grounds* 634 So.2d 163. Occasionally an appellate court will provide in its opinion for the perpetuation of the automatic stay pending Supreme Court review. See, *e.g.*, *School Board of Palm Beach County v. Winchester*, 563 So.2d 1135 (Fla. 4th DCA 1990), *quashed on other grounds* 565 So.2d 1350; see also *R.L. W. v. State*, 409 So.2d 1072 (Fla. 1st DCA 1982). If the court does not comment on the issue, the government body is required to seek a perpetuation of the stay or a withholding of the court's mandate while further review is sought. See § 17.34.

5. [§ 17.21] Automatic Stay During Extraordinary Writ Review In District Courts Of Appeal

In *State, Dept. of Health & Rehabilitative Services v. E.D.S. Federal Corp.*, 622 So.2d 90 (Fla. 1st DCA 1993), the court held that a government body is not entitled to the automatic stay when seeking discretionary review by extraordinary writ in a district court of appeal.

6. [§ 17.22] Public Body's Liability Under Automatic Stay

Although a public body is entitled to an automatic stay without the necessity of posting a bond, whether it wishes to avail itself of the automatic stay is another question. The general rule is that an unsuccessful appellant's liability for delay damages is limited to the amount of the bond. See § 17.42. When a public body takes advantage of the automatic stay, it does not post a bond. A decision under the previous appellate rules, *City of Jacksonville v. Brentwood Golf Course, Inc.*, 338 So.2d 1105 (Fla. 1st DCA 1976), holds that a public body cannot be liable for delay damages because it has posted no bond. See also *Gulf & Eastern Development Corp. v. City of Fort Lauder-dale*, 376 So.2d 878 (Fla. 4th DCA 1979). In *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001), however, the city obtained an injunction but was excused from posting a bond under a rule of civil procedure that is analogous to *Fla.R.App.P.* 9.310. The city argued that, because its liability for the wrongful injunction was limited to the bond amount, and because it had posted no bond, it could not be liable. The Supreme Court held that a public body can have unlimited liability for a wrongful injunction. Because an appellate stay is a species of injunction, the *Provident Management Corp.* ruling could be applied to allow for delay damages on appeal. See *Fu Sheng Industrial Co. v. T/F Systems, Inc.*, 690 So.2d 617 (Fla. 4th DCA 1997) (noting similarity between injunction bond and stay bond).

E. Stays In Administrative Appeals

1. [§ 17.23] In General

F.S. 120.68(3) of the Administrative Procedure Act governs stays pending administrative appeals. *Fla.R.App.P.* 9.190 effectuates *F.S.* 120.68. Both should be consulted when considering a stay of administrative action. The rules of a particular agency may also make reference to appeals. See, *e.g.*, Fla. Admin. Code Rule 25-22.061 (applying to the Public Service Commission).

Rule 9.190(e)(1) provides that the filing of a notice of appeal or a petition seeking review of administrative action does not automatically stay agency action, "except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or Chapter 120, Florida Statutes, or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries" under *F.S.* 766.301 *et seq.*

Rule 9.190(e)(2)(A) provides that an appellant may seek a stay in the first instance from either the agency itself or the reviewing court "for good cause shown." The Committee Notes to that rule state that the preferred course is to seek a stay from the administrative agency first, but recognize that not all agencies meet regularly. The unavailability of the agency would be an instance of good cause for seeking a stay in the first instance from the reviewing court. The case law also expresses a preference for initially seeking a stay from the administrative agency. *Mitchell v. Leon County School Board*, 591 So.2d 1032 (Fla. 1st DCA 1991); *Trombley v. Florida Real Estate Commission*, 356 So.2d 813 (Fla. 4th DCA 1977). There is an exception for license suspensions. See § 17.24. Review of the agency's decision is by motion in the appellate court, just as in civil appeals. *Rule* 9.190(e)(2)(A).

2. [§ 17.24] License Revocations Or Suspensions

F.S. 120.68(3) provides that a stay will be granted as **"a matter of right" when the agency suspends or revokes a license, unless the appellate court determines (on petition of the agency) that a stay would constitute a "probable danger to the health, safety, or welfare of the state." See *Ticktin v. Dept. of Professional Regulation*, 532 So.2d47 (Fla. IstDCA 1988); *Dept. of Business Regulation, Division of Alcoholic Beverages & Tobacco v. Provende, Inc.*, 399 So.2d 1038 (Fla. 3d DCA 1981). Although a stay in a license revocation or suspension proceeding is not automatic, the statute creates a presumption that a licensee is entitled to a stay in the absence of a showing by the licensing agency of great public harm.** *Fla.R.App.P.* 9.190(e)(2)(B) and (e)(2)(C) set forth the procedure for obtaining a stay of an order revoking a license. Application is made directly to the reviewing court. The agency must respond within 10 days, unless a shorter response time is set by the court. When seeking an expedited stay, the moving party should ask the court to shorten the time for a response. Practitioners should note that, as in other situations under the rules when the act to be done is not triggered by service, there is no additional time for mail service under *Rule* 9.420(e). *Ludwig v. Dept. of Health*, 778 So.2d 531 (Fla. 1st DCA 2001). If the agency does not respond, or if it fails to show that a stay will constitute a probable danger to the health, safety, or welfare of the state, a stay will issue. If the agency's response makes a prima facie showing, the court will likely allow the appellant an opportunity to reply, although the rule does not explicitly authorize this. *Ludwig* provides a discussion of stays in license revocations.

The question whether an administrative proceeding concerns the revocation or suspension of a license may not be subject to a ready answer. See, *e.g.*, *Hunt v. Dept. of Professional Regulation, Board of Psychological Examiners*, 558 So.2d 156 (Fla. 1st

DCA 1990); *Terrell Oil Co. v. Dept. of Transportation*, 541 So.2d 713 (Fla. 1st DCA 1989); *White Construction Co. v. State, Dept. of Transportation*, 526 So.2d 998 (Fla. 1st DCA 1988).

3. [§ 17.25] Other Administrative Appeals Not Controlled By Administrative Procedure Act

There are administrative agencies not subject to the Administrative Procedure Act, most notably local governments. Some orders of non-APA agencies are made appealable by statute. See, *e.g.*, *F.S.* 162.11. *Fla.R.App.P.* 9.190(e)(3) provides that stays of these orders must be sought in "the lower tribunal," *i.e.*, the non-APA administrative agency. Review of the stay order is in the appellate court by motion.

F. Stays In Appeals From Nonfnal Orders

1. [§ 17.26] In General

Fla.R.App.P. 9.130 governs nonfnal appeals. Subdivision (f) of the rule provides that, in the absence of a stay, the trial court "may proceed with all matters, including trial or final hearing" but may not render a final judgment. Nor may the trial court do anything to deprive the appellate court of jurisdiction over the nonfnal order. *Waltham A. Condominium Ass'n v. Village Management, Inc.*, 330 So.2d 227 (Fla. 4th DCA 1976). The procedure for obtaining a stay of a nonfnal order is basically the same as for a final judgment.

2. [§ 17.27] Jurisdiction Of Trial Court During Pendency Of Nonfnal Appeal

When an appellant obtains a stay in a nonfnal appeal, the trial court may not enter any order that modifes the nonfnal order under consideration in the appeal. *State ex rel. Schwartz v. Lantz*, 440 So.2d 446 (Fla. 3d DCA 1983). Nor may the trial court do anything to deprive the appellate court of effective jurisdiction over the nonfnal order. *Waltham A. Condominium Ass'n v. Village Management, Inc.*, 330 So.2d 227 (Fla. 4th DCA 1976). In all other respects the trial court may proceed with the cause, except it may not enter a final judgment. *Fla.RApp.P.* 9.130(f); *Bradenton Group, Inc. v. Dept. of Legal Affairs, State of Florida*, 701 So.2d 1170 (Fla. 5th DCA 1997), *quashed in part on other grounds* 727 So.2d 199. See § 17.29.

3. [§ 17.28] Conditions Of Stay Order

As noted in § 17.10, while it is inappropriate on a final appeal to condition a stay on the payment of attorney's fees, unless authorized by statute or contract, a stay in a nonfnal appeal may be conditioned on the payment of fees. *Lawson v. County Board of Public Instruction, Franklin County, ex rel. Alford*, 114 Fla. 153, 154 So. 170 (1934); *City of Coral Gables v. Geary*, 398 So.2d 479 (Fla. 3d DCA 1981); *Owens v. Smith*, 154 So.2d 877 (Fla. 1st DCA 1963). But see *Georgia Southern & Florida Railway Co. v. Duval Connecting Railroad Co.*, 187 So.2d 405 (Fla. 1st DCA 1966) (condition of stay on payment of attorney's fees inapplicable to eminent domain actions in which landowner questions legality of taking).

4. [§ 17.29] Orders Granting New Trials

An order granting a new trial is considered nonfnal because further judicial labor is contemplated. These orders, however, are made reviewable as final appeals by *Fla.R.App.P.* 9.110(a)(4) and 9.130(a)(4). The case law suggests that a stay is for all purposes mandatory, at least as far as proceeding with the new trial. *Mann v. Brantley*, 732 So.2d 1090 (Fla. 4th DCA 1998); *Burns Chemical, Inc. v. Whitted*, 485 So.2d 37 (Fla. 4th DCA 1986).

5. [§ 17.30] Amount Of Bond Required By Stay Order

Setting the amount of the bond in a nonfnal appeal is more speculative than in a final appeal. The bond need not bear a relationship to the damages sought by the plaintiff. *Smith v. Import Birds, Inc.*, 457 So.2d 1154 (Fla. 4th DCA 1984).

G. [§ 17.31] Stays In Original Proceedings

Fla.R.App.P. 9.310 applies to stays during the pendency of an original proceeding such as certiorari, mandamus, and prohibition. See *Rule* 9.100. A show cause order in a prohibition proceeding automatically stays further proceedings in the trial court. *Rule* 9.100(h). The factors discussed in § § 17.26-17.29, pertaining to nonfnal appeals, also apply to stays pending applications for extraordinary writs. As to stays for government bodies seeking discretionary review, see § 17.21.

H. [§ 17.32] Review Of Stay Orders

Fla.R.App.P. 9.310(f) provides that review of the trial court's stay order must be by motion filed in the appellate court. Review must be sought by motion, not by "appeal." *Shvarts v. O'Connor*, 692 So.2d 960 (Fla. 4th DCA 1997). No time limit is specifed but the review will usually be sought expedi-tiously See *Offerman v. Offerman*, 643 So.2d 1184 (Fla. 5th DCA 1994).

A motion for review should include full legal argument on the stay factors. The motion should be accompanied by an appendix containing the transcript of the proceedings below and all other pertinent documents. *City of Sarasota v. AFSCME Council '79*, 563 So.2d 830 (Fla. 1st DCA 1990). Failure to include a transcript or other appropriate documents can be fatal to the review of the trial court's stay order. *Schulz v. Reny*, 573 So.2d 1076 (Fla. 4th DCA 1991). Oral argument is rarely granted.

Because the trial court has discretion in ruling on motions for stays, its decision will be upheld by the appellate court unless an abuse is demonstrated. *Mariner Health Care of Nashville, Inc. v. Baker*, 739 So.2d 608 (Fla. 1st DCA 1999); *City of Sarasota; Pabian v. Pabian*, 469 So.2d 189 (Fla. 4th DCA 1985). An abuse of discretion will be found, however, if the bond is not adequate to protect the appellee while the appeal is pending, or if the amount is excessive. *Cohn v. Reiss*, 615 So.2d 173 (Fla. 4th DCA 1993).

I. Stays In Particular Circumstances

1. [§ 17.33] In General

A number of statutes and court rules refer to stays in particular circumstances:

· *Fla.R.App.P.* 9.100(d)(2) — orders excluding the press or public from proceedings or access to judicial records.

· *Rule* 9.100(h) — prohibition proceedings.

· *Rule 9.*146(c) — orders entered in cases involving juvenile dependency and termination of parental rights, as well as cases involving families and children in need of services.

· *Rule* 9.180(d) — orders awarding benefts in worker's compensation proceedings. See *School Board of Hillsborough County v. Lara*, 667 So.2d 368 (Fla. 1st DCA 1995) (government employer entitled to automatic stay despite rule).

· 11 *U.S.C.* § 362 — orders involving bankruptcy before or during the appeal. See *Cruise Holdings, Ltd. v. Mathiesen*, 804 So.2d 334 (Fla. 3d DCA 2001); *Carver v. Moody*, 780 So.2d 934 (Fla. 1st DCA 2001).

· 12 *U.S.C.* § 91 —judgments entered against national banks. See *First Union National Bank v. Turney*, 832 So.2d 768 (Fla. 1st DCA 2002); *United States v. Lemaire*, 826 F.2d 387 (5th Cir. 1987); *Annot., Validity, Construction, and Application of Prohibition in 12 U.S.C.A. § 91 (and Similar Predecessor Provisions) Against Certain Attachments, Injunctions, or Executions with Respect to National Banks*, 142 A.L.R.Fed. 163 (1997).

· *F.S.* 39.510(3) — orders in dependency cases.

· *F.S.* 39.815(3) — orders terminating parental rights.

· *F.S.* 55.509 — foreign judgments filed in Florida. See *SCG Travel, Inc. v. Westminster Financial Corp.*, 583 So.2d 723 (Fla. 4th DCA 1991).

· *F.S.* 55.607 — stay during appeal of foreign judgment.

· *F.S.* 68.093 — "vexatious" pro se litigants.

· *F.S.* 70.001(6)(a) — nonfnal appeal by government does not act as automatic stay in action for injury to real property.

· *F.S.* 79.12 — ORDers in habeas corpus proceedings.

· *F.S.* 98.075(7)(b)5 — orders in voter registration proceedings.

· *F.S.* 119.11(2) — orders concerning the Public Records Act. *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

· *F.S.* 206.21(4) — orders entered in proceedings for forfeiture of vehicles and boats for illegally transporting or delivering motor fuel.

· *F.S.* 318.16 — appeals of noncriminal traffc infractions.

· *F.S.* 322.2615(13), 322.272, 322.28(5), 322.64(9), (13) — orders revoking or suspending driver's licenses. See *State Dept of Highway Safety & Motor Vehicles v. Begley*, 776 So.2d 278 (Fla. 1st DCA 2000); *Anderson v. Dept. of Highway Safety & Motor Vehicles*, 751 So.2d 749 (Fla. 5th DCA 2000); *Larcher v. Dept. of Highway Safety & Motor Vehicles, State of Florida*, 736 So.2d 1249 (Fla. 5th DCA 1999).

· *F.S.* 333.08(3), 333.11(2) — orders concerning airport zoning regulations

· *F.S.* 380.07(2) — development orders for property within the area designated "of critical state concern."

· *F.S.* 392.60(1) — orders entered in proceedings for commitment to the state tuberculosis hospital.

· *F.S.* 393.11(12)(b) — orders involuntarily committing mentally disabled persons.

· *F.S.* 440.25(5)(c) — orders appealed by employers not having insurance in worker's compensation cases. See *Machin v. Lumber Transport, Inc.*, 556 So.2d 446 (Fla. 1st DCA 1990).

· *F.S.* 443.151(5)(b) — orders of the Unemployment Appeals Commission.

· *F.S.* 479.08 — orders denying or revoking outdoor advertising permits.

· *F.S.* 509.417(3) — orders concerning the seizure of property from those owing money for occupancy in a public lodging establishment.
· *F.S.* 513.151(9)(c) — orders concerning the seizure of property for occupancy in a recreational vehicle park.
· *F.S.* 561.29(5) — orders suspending or revoking liquor licenses. See *Redner v. State*, 532 So.2d 8 (Fla. 2d DCA 1988).
· *F.S.* 569.23 — judgments against tobacco settlement agreement signatories, successors, parents, and affliates.
· *F.S.* 631.041 — stay of actions against insolvent insurers. See *Payroll Transfers Interstate, Inc. v. Forshey*, 694 So.2d 80 (Fla. 1st DCA 1997); *American Bonding Co. v. Coastal Metal Sales, Inc.*, 679 So.2d 1250 (Fla. 2d DCA 1996); *Sierra v. International Medical Centers, Inc.*, 538 So.2d 102 (Fla. 3d DCA 1989).
· *F.S.* 760.11(13) — orders of the Florida Human Rights Commission.
· *F.S.* 760.35(3)(c) — orders finding discrimination in housing practices.
· *F.S.* 766.105(3)(f)4-(3)(f)5 —judgments against Florida Patient's Compensation Fund.
· *F.S.* 766.212 — arbitration awards in medical malpractice actions. *St. Mary's Hospital, Inc. v. Phillipe*, 769 So.2d 961 (Fla. 2000).
· *F.S.* 766.311(2) — birth-related neurological injury compensation claims.
· *F.S.* 768.733 — punitive-damages judgments in certifed class actions.
· *F.S.* 905.28(2) — orders concerning the public announcement of a grand jury report or presentment.

In some instances, the courts have refused to apply these specialized statutes based on confict with *Rule* 9.310. See, *e.g.*, *Wait*.

2. [§ 17.34] Stays Pending Review By Florida Supreme Court

A stay of a pending discretionary review may be sought by filing a motion in the district court of appeal. *Fla.R.App.P.* 9.310(a). When Supreme Court review is sought, the stay obtained in the trial court is not automatically perpetuated. *Rule* 9.310(e) provides that "[a] stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modifed or vacated." *Rule* 9.340(a) states that, "[u]nless otherwise ordered by the court or provided by these rules, the clerk shall issue such mandate or process as may be directed by the court after expiration of 15 days from the date of an order or decision." *Rule* 9.340(b) provides: "if a timely motion for rehearing, clarification, or certifcation has been filed, the time for issuance of the mandate or other process shall be extended until 15 days after rendition of the order denying the motion, or, if granted, until 15 days after the cause has been fully determined." Issuance of the mandate under *Rule* 9.340 is a ministerial duty and may be compelled by writ of mandamus. *State ex rel. Price v. McCord*, 380 So.2d 1037 (Fla. 1980).

The District Court of Appeal, Second District, held, however, that *McCord* applies only to those cases involving a final judgment for money damages that grant the prevailing party a vested right. *State v. Miyasato*, 805 So.2d 818 (Fla. 2d DCA 2001). In *Miyasato*, the state failed to file its motion to stay mandate within the required 15 days from the district court's decision reversing the trial court's denial of a motion to suppress in a criminal trial. The defendant argued the issuance of the mandate was a ministerial duty that the district court was compelled to perform. The district court rejected the defendant's argument, holding that in criminal cases other considerations apply, noting in particular the problem of double jeopardy if the state were forced to proceed without the suppressed evidence. For a discussion of how *Rule* 9.310 applies to a public body seeking discretionary review in the Supreme Court of Florida, see § 17.20.

If a party wishes to perpetuate a stay while seeking Supreme Court review, the parties must file a motion in the district court requesting that court to extend the stay to withhold issuance of its mandate. *City of Miami v. Arostegui*, 616 So.2d 1117 (Fla. 1st DCA 1993), *quashed in part on other grounds* 634 So.2d 163. Action must be taken in the district court within 15 days after the decision becomes final. See 1977 Committee Note to *Rule* 9.310; but see *Miyasato*. If the mandate has already issued, the motion for stay and to recall the mandate during pendency of review in the Supreme Court may be filed in either the district court or the Supreme Court, although filing in the district court is preferred. *State v. Roberts*, 661 So.2d 821 (Fla. 1995) *quashed on other grounds* 677 So.2d 264. The granting of the motion will protect the moving party fully during Supreme Court review. *Massie v. University of Florida*, 570 So.2d 963 (Fla. 1st DCA 1990), *quashed on other grounds* 602 So.2d 516. If this motion is not filed, the parties and the trial court must comply with the district court's mandate. *State v. McKinnon*, 540 So.2d 111 (Fla. 1989), *receded from on other grounds* 661 So.2d 821. If the district court of appeal denies the motion to stay the mandate, the petitioner may seek relief from the Supreme Court. *Rule* 9.310(f); *Roberts*. The Chief Justice or Administrative Justice rules on these requests, under Section VI of the Supreme Court of Florida Manual of Internal Operating Procedures. See also *Fla.R.Jud.Admin.* 2.205(a)(2)(B)(ii).

As set forth in the 1977 Committee Notes to *Rule* 9.120, the moving party must show that there is a likelihood that the Supreme Court will accept jurisdiction, the movant will be successful on the merits, and irremediable harm will be caused by the denial. See *State ex rel. Price; Thibodeau v. Sarasota Memorial Hospital*, 449 So.2d 297 (Fla. 1st DCA 1984). See also *Roberts*.

3. [§ 17.35] Stays Under All Writs Power

Article V of the Florida Constitution provides that the appellate courts have jurisdiction to issue all writs necessary to the complete exercise of their jurisdiction. This "all writs" power can be used as a vehicle to seek a stay. See *Fraternal Order of Police Lodge 92 v. Freeman*, 372 So.2d 945 (Fla. 3d DCA 1979). The 1977 Committee Note to *Fla.R.App.P.* 9.310 states that the rule is not intended to interfere with the all writs power, but that an application for a stay in the trial court under the rule is the "normal and preferred procedure." The all writs power should be used in only the most unusual situations not covered or contemplated by the rule.

4. [§ 17.36] Stays Pending Review By United States Supreme Court

The 1977 Committee Note to *Fla.R.App.P.* 9.310 states that a party seeking review in the United States Supreme Court should move to stay the mandate as if seeking further review in the Florida courts. See *Williams v. Keyes*, 135 Fla. 769,186 So. 250 (1939). Federal law also requires that a stay be sought first in the state court, in the absence of extraordinary circumstances. 28 *U.S.C.* § 2101(f); Sup.Ct.R. 23. *See New York Times Co. v. Jascalevich*, 439 U.S. 1331, 99 S.Ct. 11, 58 L.Ed.2d 38 (1978); *Annot., Construction, in Civil Case, of 28 USC § 2101(f), Providing for Stay of Execution or Enforcement of Judgment Subject to Review by United States Supreme Court on Certiorari*, 2 A.L.R.Fed. 657 (1969).

If review of a Florida Supreme Court decision is sought in the United States Supreme Court, a motion to stay the mandate should be filed in the Florida Supreme Court. Under Section VI of the Supreme Court of Florida Manual of Internal Operating Procedures, the Chief Justice or Administrative Justice is authorized to stay the mandate for 30 days to allow counsel an opportunity to obtain a further stay from the United States Supreme Court.

When review of a district court of appeal decision is sought in the United States Supreme Court, the motion to stay the mandate should be filed in the district court of appeal. Sup.Ct.R. 23; 28 *U.S.C.* § 2101(f).

J. Bonds

1. [§ 17.37] In General

Fla.R.App.P. 9.310(c)(1) requires that the principal and a surety company authorized to do business in Florida execute a bond, or that cash be deposited in the court clerk's offce. *Rule* 9.310(b)(1) allows multiple parties wishing to appeal to post a single bond for the requisite amount.

Before 1992, *Rule* 9.310(c)(1) allowed two personal sureties on a bond in the place of one surety company. That provision was removed in 1992, and it is no longer possible to have personal sureties on a bond. *Rule* 9.310(c)(1) was also amended in 1992 to allow a cash bond to be posted instead of a surety bond. Before that amendment, it was not permissible to file a cash bond, at least not without leave of court. *Waller v. DSA Group, Inc.*, 606 So.2d 1234 (Fla. 2d DCA 1992). The amount of the cash bond must be the same as the surety bond and must be deposited with the clerk of the circuit court during the pendency of the appeal. A cash bond may be subject to the claims of creditors as a "preference" under federal bankruptcy law. *In re Pan Am Corp.*, 166 B.R. 538 (S.D. N.Y. 1993); *In re Thomson McKinnon Securities, Inc.*, 125 B.R. 94 (Bankr. S.D. N.Y. 1991).

When the appeal is from a money judgment, a stay pending review is automatic if a party posts "a good and suffcient 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." *Rule* 9.310(b)(1). See § § 17.13 and 17.15 for limitations imposed by *F.S.* 45.045. In certain cases the extent of insurance coverage or other partial obligations to pay interest may require an evidentiary determination by the court. See § § 17.13-17.16. The rule permits partial or multiple supersedeas bonds when one or more partie's liability is less than the total judgment amount.

2. [§ 17.38] Liability On Bond

A bond is a contract of indemnity, such that the liability of the principal and surety is contractual in nature. *Labell v. Campbell*, 99 Fla. 1125, 128 So. 422 (1930). The bond covers all damages naturally flowing from the delay in collection caused by the appeal. The depreciation in the value of property during the pendency of an appeal is compensable. *Fu Sheng Industrial Co. v. T/F Systems, Inc.*, 690 So.2d 617 (Fla. 4th DCA 1997); *Price v. Rome, 231* So.2d 835 (Fla. 3d DCA 1970); *All Florida Surety*

Co. v. Vann, 128 So.2d 768 (Fla. 3d DCA 1961). A bond does not cover damages incurred before the appeal or after the return of the mandate. *Fu Sheng Industrial Co.; Hickman v. Hickman, 111* So.2d 844 (Fla. 2d DCA 1965), 9 A.L.R.3d 327.

By executing the bond, the surety contractually agrees to be liable for damages up to the amount of the bond only. *Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So.2d 1018 (Fla. 1989); *Fu Sheng Industrial Co.*

In *American Casualty Co. of Reading, Pennsylvania v. Pan American Bank of Miami*, 156 So.2d 27, 29 (Fla. 2d DCA 1963), the District Court of Appeal, Second District, quotes the general rule of 5 C.J.S. *Appeal and Error* § 2049f, which states that the dismissal or abandonment of an appeal operates as "an affrmance within the meaning of a bond conditioned to pay or satisfy the judgment if affrmed." If the principal breaches the bond by failing to perfect its appeal or by permitting the appeal to fail for lack of prosecution, so that the appeal is dismissed, the surety is liable on the supersedeas bond. See *Knapp v. Fredrickson*, 156 Fla. 600, 23 So.2d 762 (1945), 163 A.L.R. 407 (circuit court had authority to require that appellant give supersedeas bond on condition that appellant be held liable on bond if appellant failed to promptly prosecute appeal, or in event appeal was dismissed, or if decree appealed from was affrmed).

3. [§ 17.39] Requirements Of Bond

Fla.R.App.P. 9.310(c)(2) requires that the bond 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 affrmed." The trial court is also given the power to impose "such other conditions as may be required." *Id.* A form for the bond is *Form* 9.900(i). If the posted bond is defective, the trial court may allow the posting of an amended bond. *FS.* 45.041. No form is found in the rules for a cash bond, but it should closely follow the form for a surety bond with the further notation that the cash has been deposited with the clerk of the trial court.

4. [§ 17.40] Who May Act As Surety

An attorney is prohibited by statute from acting as surety on a bond for a client. *F.S.* 454.20. Because personal sureties are no longer authorized (see § 17.37), this issue should not arise in the future. A party to the action cannot act as a surety. *Craig v. Wilder*, 125 Fla. 384, 169 So. 847 (1936). An insurance carrier that is responsible for the payment of the judgment may act as a surety if it is not a named party in the lawsuit. *Community Health of South Dade, Inc. v. Hale*, 395 So.2d 1286 (Fla. 3d DCA 1981).

5. [§ 17.41] Cost Of Bond

There are approximately 450 companies in Florida authorized to issue bonds. A list of these companies can be obtained from the Department of Financial Services, Offce of Insurance Regulation.

The Surety Association of America recommends an annual premium of $10 per $1,000 when the amount is collateralized and $20 per $1,000 when the amount is uncollateralized. These figures are subject to minimum charges and other variations. Attorneys should also recognize that this is an annual premium, and appeals often take more than one year. When the appeal is concluded, the practitioner should obtain a court order releasing the bond as soon as possible so that liability on the bond premium is terminated.

Bonds also become less expensive as they become larger. For example, the recommended premium on a collateralized bond of $1 million is $5,317.50. A prevailing appellant may recover the premium for the bond as a court cost. *Fla.R.App.P.* 9.400(a)(3). The bonding company generally requires a financial statement from the principal and always requires the principal to sign an indemnity agreement. Most bonding companies do not accept real property as security for a collateralized bond. Irrevocable letters of credit, certifed checks, United States government bonds, municipal bonds that carry a certain rating, and other forms of safe collateral are generally required. It should be explained to the client early on that the surety is not assuming the client's liability on the judgment, but rather is lending its credit to assure the appellee and the court that the client will pay the judgment.

6. [§ 17.42] Postappeal Proceedings On Bond

Fla.R.App.P. 9.310(d) provides that a surety on a bond submits to the jurisdiction of both the trial court and the appellate court. Either the trial court or the appellate court may enforce the surety's liability "after motion and notice, without the necessity of an independent action." *Id.*

Parties will usually collect from a surety on a supersedeas bond by moving for judgment in the trial court against the surety in the appropriate amount, following receipt of the mandate. The lower court may enter a final money judgment against the surety.

The amount of the judgment that can be entered on the bond is limited to the face amount of the bond. *Fu Sheng Industrial Co. v. T/F Systems, Inc.*, 690 So.2d 617 (Fla. 4th DCA 1997). A form for the motion is set out in § 17.43, and one for the judgment is suggested in § 17.44.

A final judgment on a supersedeas bond on an appeal from a money judgment should include all interest to date on the original judgment, together with other items allowed by *Rule* 9.310(c)(2). The postjudgment interest runs on the judgment at the statutory rate in effect at the time judgment is entered. Review of the trial court's judgment against the surety is by nonfnal appeal under *Rule* 9.130(a)(4).

The trial court may not discharge the bond before attorney's fees are awarded, assuming these fees are otherwise awardable and that the bond secures the payment of fees. *Capital Bank v. MVB, Inc.*, 683 So.2d 1175 (Fla. 3d DCA 1996). The court in *Capital Bank* distinguished *Finst Development, Inc. v. Bemaor*, 449 So.2d 290 (Fla. 3d DCA 1983). In *Finst*, the party who obtained a money judgment in the trial court moved for attorney's fees and costs. The trial court had reserved jurisdiction on these issues and entered judgment for fees and costs. Meanwhile, the losing party had appealed and superseded the money judgment by posting a bond. The trial court then stayed the fees and costs judgment. The district court held that the supersedeas of the original money judgment did not stay execution of the fees and costs judgment, which had to be independently superseded.

If execution of the judgment is necessary, the lawyer should note the requirement of *F.S.* 56.051 that the first attempt by the sheriff should be directed against the principal's property. See *Royal Indemnity Co. v. Knott*, 101 Fla. 1495, 136 So. 474 (1931). Practitioners should also refer to *F.S.* 55.13, which furnishes the surety with certain rights in collecting against the principal.

Under *F.S.* 55.03, interest on the original judgment runs from the date of its rendition and continues to run until payment unless otherwise established under written contract or obligation. *F.S.* 55.03(2) requires that "[a]ny judgment for money damages or order for a judicial sale and any process or writ directed to a sheriff for execution shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment accrues on the judgment until it is paid."

7. [§ 17.43] Form For Motion For Judgment On Supersedeas Bond

(Party Designation)
(Title of Trial Court)

PLAINTIFF's MOTION FOR ENTRY OF JUDGMENT ON SUPERSEDEAS BOND

Plaintiff moves for judgment against ___(name of surety)___ in the sum of $___ because:
1. The District Court of Appeal, ___ District, affrmed the fnal judgment rendered in this action in the principal sum of $___, with costs to plaintiff as appellee.
2. The appellate court's mandate was issued on ___(date)___
3. Taxable appellate costs are $___ and include the following:
[set out the items and the corresponding amounts]
4. Interest on the principal sum is $___
(Certifcate of Service)

___
Attorney for Plaintiff
___(address and phone number)___
Florida Bar number___

8. [§ 17.44] Form For Final Judgment Against Surety

(Party Designation)
(Title of Trial Court)

FINAL JUDGMENT

This action was heard on plaintiff's motion for judgment on the super-sedeas bond. On the evidence presented
IT IS ADJUDGED that plaintiff, ___, recover from surety the sum of $___ with costs in the sum of $___, making a total of $___, that bears interest at the rate of ___% a year, for which let execution issue.
ORDERED at ___, Florida, on___ (date)___

___
Judge
Copies furnished to: ___

9. [§ 17.45] Taxation Of Costs For Bond Premium, Associated Expenses, And Other Security Devices

The bond premium is a taxable cost that can be recovered by a prevailing appellant. *Fla.R.App.P.* 9.400(a)(3); *F.S.* 57.071(1). The charge for obtaining a letter of credit and other miscellaneous expenses required by the surety may also be taxable. *Okeelanta Corp. v. Bygrave*, 727 So.2d 950 (Fla. 4th DCA 1997); *Melvin v. West*, 120 So.2d 233 (Fla. 2d DCA 1960), 90 A.L.R.2d 443; *Bose Corp. v. Consumers Union of U.S., Inc.*, 806 F.2d 304 (1st Cir. 1986); but see *Record Club of America, Inc. v. United Artists Records, Inc.*, 731 F.Supp. 602 (S.D. N.Y. 1990) (taxing costs for letter of credit unsupported by federal appellate rule governing costs). The loss of interest on a cash bond, however, is not a taxable cost. *Rehman v. ECC International Corp.*, 707 So.2d 752 (Fla. 5th DCA 1998); *Baya v. Revitz*, 363 So.2d 44 (Fla. 3d DCA 1978).

III. CRIMINAL CASES

A. [§ 17.46] In General

The prosecution and the defense seek stays in criminal cases for different purposes; these will be separately discussed in the following sections. The state will seek a stay of the proceedings in the trial court during the period when it is obtaining judicial review of an adverse pretrial order (the types of orders that may be subject to review are set forth in *Fla.R.App.P.* 9.140(c)). Posttrial, the state may obtain a stay of orders granting a motion for a new trial, arresting judgment, or granting a motion for judgment of acquittal after a jury verdict.

The terms "stay" and "posttrial release" are synonymous. The post-trial release of a convicted defendant pending appeal is often referred to as a stay because the effect of the posttrial release is to enable the defendant to remain free while the appeal is pending. The phrase "stay of execution" is also used when the defendant stands convicted of a misdemeanor, faces a short period of incarceration (or none), and during the appellate process seeks to stay the non-incarcerative penalties of payment of fines and costs, drug treatment, alcohol treatment, probation, and, in DUI cases, impoundment of the defendant's car.

B. The Defense Perspective

1. [§ 17.47] Eligibility For Stay Or Posttrial Release

As an initial matter, persons convicted previously of a felony cannot remain at liberty if sentenced to jail or prison pending appeal of a felony conviction, under *Fla.RCrim.P.* 3.691 (posttrial release), so the occasions when counsel may be able to seek a stay are limited. See *MacLean v. Rouse*, 506 F.Supp. 1313 (S.D. Fla. 1981), in which the federal court fully discussed (in considering a petition for writ of habeas corpus filed by a felon convicted in a Florida state court, challenging the constitutionality of the rule) the constitutional due process and cruel and unusual punishment issues, and interpreted the legislative intent of the rule with respect to nonrelease of convicted felons under the reasonableness standard. Although the court denied relief, the case is useful as a benchmark against which to measure the likelihood of succeeding on this type of motion.

Practitioners should note that posttrial release pending appeal is possible for a first-time felon (provided that the defendant has no pending felony charges on which probable cause has been found), or for a prior felon who is now appealing a conviction for a misdemeanor. *Dotson v. State*, 764 So.2d 6 (Fla. 4th DCA 1999) (prior felony convictions did not absolutely foreclose release pending appeal of present misdemeanor convictions; remanded for trial court to exercise its discretion in the matter). A person who, although previously convicted of a felony, has had his or her civil rights restored is not, under this rule, a felon. *Montgomery v. State*, 788 So.2d 274 (Fla. 4th DCA 2000), *approved* 897 So.2d 1282 (defendant who previously pled no contest to felony charge had adjudication withheld and his civil rights were not lost; on remand court must exercise discretion in considering whether to grant posttrial release).

Persons sentenced to short incarcerative terms (common, for example, in misdemeanor DUI and petit theft cases, but also for white collar and other nonviolent felonies) are likely to be granted stays of execution and posttrial release on recognizance or a supersedeas bond. Unlike a civil supersedeas bond (easily computed as the total amount of the judgment plus two year's statutory interest), the supersedeas bond in a criminal case is issued chiefy to secure the defendant's appearance, although the bond may also guarantee payment of restitution, fines, and costs. Thus, the amount of a criminal supersedeas bond largely depends on the trial court's discretionary conclusion that a bond in the amount of "n" dollars will secure the defendant's return to court, where "n" can range from zero to millions of dollars.

Because a condition of the release may well include a requirement that the monetary obligations of the sentence are met (the money can be refunded if the defendant prevails on appeal), a motion for posttrial release should also include grounds for a stay of execution.

2. [§ 17.48] Posttrial Release

In addition to *Fla.R.Crim.P.* 3.691, discussed in § 17.47, various provisions of *F.S.* Chapter 924 govern posttrial release for convicted defendants. (Practitioners handling criminal appeals in Florida courts should study that chapter and its annotations; only a few of the sections are discussed here.)

F.S. 924.14 (stay of execution when defendant appeals, subject to *F.S.* 924.065) and *F.S.* 924.065 (denial of motion for new trial or arrest of judgment; appeal bond; supersedeas) operate together to govern the defendant's posttrial release and the resulting stay of execution. They remind the practitioner that the mere filing of a notice of appeal does not operate as a stay; it is the bond ("with at least two sureties to secure the payment of the judgment, fine, and any future costs," and conditioned upon the defendant's promise to appear) that both stays execution and releases the defendant pending appeal. *F.S.* 924.065(2).

F.S. 924.17 provides that an indigent defendant is entitled to "a supersedeas without payment of costs." This seems to mandate that an indigent defendant who is eligible for posttrial release should not be barred from that relief by lack of funds for a supersedeas bond. The reality is that all of the cases interpreting this statute relate to costs of the appeal *(i.e.*, filing fees, transcript costs). There are no cases that interpret this statute as meaning that the trial court must release on his or her own recognizance, pending a defense appeal, an indigent defendant who was convicted of a felony. See, *e.g.*, *Davis v. State*, 634 So.2d 287, 288 (Fla. 1st DCA 1994) (judge's comments that he would "reserve the right to impose appellate costs on [defendant] if he chose to appeal," because judge thought appeal "frivolous," were improper although costs were not actually imposed; "costs" referred to were filing fees and transcript costs, not cost of supersedeas bond for appellant). The terms of a posttrial release are up to the court's sound discretion.

Younghans v. State, 90 So.2d 308 (Fla. 1956), which is cited in *Rule* 3.691(a) for the "principles enunciated" therein, is the leading case on posttrial release pending appeal. The *Younghans* court held that "admission to bail, after conviction, is not a matter of right, but rests in the sound judicial discretion of the trial court." *Id.* at 309. *Younghans* requires a trial court to consider, first, whether the defendant's appeal is "taken in good faith, on grounds not frivolous but fairly debatable." *Id.* at 310. This does not mean, however, that the case must be a "winner" or even "very likely to succeed." *Boles v. State*, 388 So.2d 581 (Fla. 5th DCA 1980). The leading case for explaining this standard is *Baker v. State*, 213 So.2d 285, 287 (Fla. 4th DCA 1968) ("[g]ood faith does not mean there is probable cause to believe the judgment will be reversed"); see also *Childers v. State*, 847 So.2d 1120, 1121 (Fla. 1st DCA 2003) ("The standard is whether the issues raised are open to debate and involve reasonable questions").

According to *Younghans*, as the next step in deciding whether to grant posttrial release, the trial court "might consider" three points: (1) the defendant's habit of respect for the law, (2) local attachments to the community, including family, business, or investments, and (3) the severity of the punishment imposed, and "any other circumstances relevant to the question of whether the person would be tempted to remove himself from the jurisdiction of the court." *Id.* at 310.

If posttrial release is denied, the trial court must include in the order the judge's "reasons for denying bail," and those reasons "should be sound and they should be clearly stated." *Id.* Although most of the reported cases that cite *Younghans* merely recite the foregoing elements, and *Rule* 3.691 has sharply limited the judge's ability to entertain a posttrial release motion, the defendant's status and the facts of a case may well indicate that the effort is worthwhile. It is likely that many judges on the bench today have never been presented with a *Younghans* motion.

3. [§ 17.49] Proceedings In Trial Court

Most of the work for the defense related to stays and posttrial release is done in the trial court, whether by trial or appellate counsel.

Counsel may bring three documents (with appropriate copies for opposing counsel and the judge) to the last day of trial (if a misdemeanor), or on the day of sentencing: a motion for stay pending appeal and for posttrial release, a proposed order on that motion, and a notice of appeal. A motion for stay pending appeal cannot be entertained until the notice of appeal is filed, but the notice can be filed in open court. The motion has no effect on the deadlines for filing a motion for new trial or the notice of appeal.

4. [§ 17.50] Motion For Stay Pending Appeal And For Posttrial Release

State of Florida,

___,

IN THE [CIRCUIT/COUNTY] COURT, FLORIDA

Plaintiff,

v.

___,

Defendant.

Case No.___

MOTION FOR STAY PENDING APPEAL AND FOR POSTTRIAL RELEASE

Defendant, ___(name)___, moves for entry of an order staying execution of ___ his/her___ sentence and for posttrial release pending appeal in the above-referenced case, asserting the following grounds for the motion.

1. Defendant was convicted ___on (date)___ of ___(offense(s))___, and the motion for a new trial was denied on ___(date)___

2. Defendant has timely fled a notice of appeal. [The notice of appeal can be fled in open court.]

3. [If applicable: The appeal can be expected to take longer than the sentence, so that, without a stay, defendant will have served all or a substantial portion of ___his/her___ sentence prior to a ruling on the appeal.]

4. Defendant represents that, under Younghaus v. State, 90 So. 2d 308, 310 (Fla. 1956), the appeal is "taken in good faith, on grounds not frivolous but fairly debatable." [If issues are known, they can be listed.]

5. The court is also asked to consider, per Younghans, that (1) defendant has, during the pendency of the proceedings, demonstrated respect for the law, and (2) ___he/she___ has signifcant "local attachments to the community, by way of family ties, business, or investments." Defendant is a ___lifelong/num ber of years___ resident of this county.

6. The court is urged to note the third element of the Younghans test:

(a) **"[T]he severity of the punishment imposed for the offense." [Discuss the offense: non-violent, minor, unlikely to be repeated, etc.]**

(b) **"[A[nd any other circumstances relevant to the question of whether the person would be tempted to remove himself from the jurisdiction of the court." Defendant promises to appear [as ___he/she___ has done on every court date[, whenever required to do so. [Add any other evidence of likelihood to appear when required, such as posting of defendant's own or a relative's home as collateral for a supersedeas bond.] See Florida Statute 924.065(2) (bond pending appeal).**

WHEREFORE, defendant ___ respectfully requests that the foregoing motion be granted.

(Certifcate of Service)

___

Attorney for Defendant

___(address and phone number)___

Florida Bar Number___

5. [§ 17.51] Review Of Order Denying Stay Or Posttrial Release

Fla.R.Crim.P. 3.691(c) authorizes, and *Fla.RApp.P.* 9.140(h)(4) sets forth, the procedure for appellate review of orders denying posttrial release. This is done by motion directed to the appellate court, where it will be treated on an expedited basis. See *Lundy v. State*, 995 So.2d 982 (Fla. 1st DCA 2007); *Childers v. State*, 847 So.2d 1120 (Fla. 1st DCA 2003). The motion, in addition to setting forth the facts and the law in support of reversal *(i.e.*, a grant of the desired posttrial release), must be accompanied by an appendix that contains whatever the movant wishes to have the court consider in conducting its review. For example, in *Montgomery v. State*, 788 So.2d 274, 275 (Fla. 4th DCA 2000), *approved* 897 So.2d 1282, the appellant submitted "exhibits ... undisputed by the State" that showed that he "has no prior felony convictions that would disqualify him for post-trial release." See *Rule* 9.220 for guidance in preparing this sort of abbreviated record. The appendix is crucial because the record on appeal will not have been prepared (indeed, it may not have been fully identifed) by the time the appellate court has before it the order denying the release. See also Chapter 18 of this manual.

6. [§ 17.52] Standard Of Review Of Order Denying Stay Or Posttrial Release

As noted at § 17.48, the standard of review of orders denying post-trial release is whether the trial court abused its sound judicial discretion, which is a deferential standard. Reversal is most commonly ordered in cases in which the order of denial omits the necessary "reasons for denying [post-trial release]," which "should be sound and ... should be clearly stated." *Younghans v. State*, 90 So.2d 308, 310 (Fla. 1956); see *Montgomery v. State*, 788 So.2d 274, 275 (Fla. 4th DCA 2000), *approved* 897 So.2d 1282 (trial court failed to "exercise [its] discretion and reduce its reasons for the denial of appellant's release to writing"; remanded for court to "reconsider posttrial bail ... pursuant to the principles enunciated in *Younghans")*, and *Lundy v. State*, 995 So.2d 982 (Fla. 1st DCA 2007).

C. [§ 17.53] Stay Of Rendition Pending Disposition Of Motion To Correct Sentencing Error

Sentencing errors that can and should be corrected prior to proceeding to the full appeal are so common that subdivison (b)(1)(A) was added to *Fla.R.Crim.P.* 3.800 in 1996, and the entire rule was substantially rewritten in 1999 to make this a more effcient process using fewer judicial resources. The procedure under *Rule* 3.800(b)(1) authorizes the state or the defense to move to correct the sentence "[d]uring the time allowed for the filing of a notice of appeal." *Rule* 3.800(b)(1)(B) sets time limits for the trial court to consider the motion and hold a hearing; if the motion has not been resolved by order within 60 days, the motion "shall be considered denied," and the notice of appeal must then be timely filed. (The state can file the motion only if the result would be to beneft the defendant or "correct a scrivener's error." *Rule* 3.800(b).)

A *Rule* 3.800(b)(1)(A) motion is an "authorized motion which tolls the time for filing the notice of appeal." See Committee Notes, 1996 Amendments. This motion operates to stay rendition of the judgment and sentence so that the notice of appeal will be timely if filed within 30 days after the order on the *Rule* 3.800 motion has been rendered.

In the event that the basis for a motion to correct a sentencing error is discovered after the notice of appeal has been filed, under *Rule* 3.800(b)(2), appellate counsel for either the state or the defense may file the motion in the trial court and must serve it before the moving party's first brief has been served. At the same time, counsel must file a notice in the appellate court that the motion is pending, so that the court will order an extension of the time for filing the movant's brief until 10 days after the clerk of the trial court has transmitted the supplemental record (consisting of the sentencing correction motion and proceedings). The appeal will then proceed.

D. Stays In State Appeals

1. [§ 17.54] Pretrial Versus Posttrial State Appeals

The state's concerns, in the event that it decides to appeal an adverse pretrial order under *Fla.R.App.P.* 9.140(c) and *F.S.* 924.07 and 924.071, relate to (1) staying the trial while the appeal is heard; (2) whether the defendant can be held on bail or in custody; and (3) whether the speedy trial period — chiefy under *Fla.RCrim.P.* 3.191, but also with respect to constitutional speedy trial — will run while the appeal is wending its way through the appellate courts. In the limited class of state posttrial appeals, whether the defendant can or will go free in the interim is an important consideration for the state and the defense.

2. [§ 17.55] Motion For Stay; Automatic Stay

The state is entitled to a stay of the trial court proceedings while it appeals an adverse pretrial order on any of the grounds listed in *Fla.RApp.P.* 9.140(c), but must file a motion for stay in the trial court unless the appeal is from an order granting a motion to suppress evidence or a motion suppressing a confession. Filing a notice of appeal from the suppression order is itself suffcient to stay all proceedings in the trial court. See *F.S.* 924.071(1). The state's posttrial filing of a notice of appeal from an order granting a new trial also operates as an automatic stay. *State v. Jimenez*, 508 So.2d 1257 (Fla. 3d DCA 1987).

3. [§ 17.56] Effect Of State Appeal On Speedy Trial

Neither a motion for stay nor a statutory automatic stay during the pendency of a state appeal resolves the issue of whether the speedy trial time continues to run. Unless the defendant has validly waived the right to a speedy trial (as by moving for a continuance or by signing a waiver), the state must move for an extension of speedy trial while the appeal proceeds. *State v. Lopez*, 402 So.2d 1189 (Fla. 2d DCA 1981) (defendant waived speedy trial under *Fla.KCrim.P.* 3.191(a), but defendant's constitutional right to speedy trial was not waived; on remand, defendant remained entitled to be brought to trial "within a reasonable time"). The prudent prosecutor who files an appeal will therefore move also for an order extending the speedy trial time, an order the trial court must issue. *State v. Jenkins*, 389 So.2d 971 (Fla. 1980) (but practitioners should note that the

holding of this case, that defendant must be discharged, has been substantially abolished by subsequent modifcations to the speedy trial rule). See also *State v. Clarke*, 810 So.2d 882 (Fla. 2002).

4. [§ 17.57] Release Of Defendant Pending State Appeal Of Nonfnal Order

During an appeal from an order dismissing an indictment or information, the defendant is free. The state cannot hold the accused while the appeal is pending, although it can request that the defendant be briefy retained on the same terms (on bail or in custody) under *Fla.R.Crim.P.* 3.190(e) while it refles the indictment or information. Should the state elect not to refle, the defendant cannot be restrained in any manner while the state's appeal proceeds. *Fontana v. Rice*, 644 So.2d 502 (Fla. 1994) (habeas corpus petition granted; defendant could not be held on bail, although greatly reduced, during pendency of state appeal from dismissal of charges).

Other pretrial appeals by the state, however, authorize the release of the affected defendants on the defendant's own recognizance, pending the state's appeal. *F.S.* 924.071(2). Counsel for other defendants in the case should be aware that codefendants whose cases are affected by the same evidence, confession, or admission that was suppressed and appealed must also be released on their own recognizance. (Only one pretrial appeal is allowed per case. *F.S.* 924.07(l)(h).) A release on one's own recognizance, while it imposes no other restrictions, does require the defendant to promise to return to court, if and when required.

5. [§ 17.58] Release Of Defendant Pending State Appeal Of Final Order

Because *Fla.R.App.P.* 9.140(h) relates only to posttrial release, *Rule* 9.140(h)(2) can require the release of a defendant only in the event of a state appeal that is taken posttrial. Practitioners should recall that the state can appeal only from posttrial orders that grant a new trial, arrest judgment, or grant a motion for judgment of acquittal after a jury verdict.

Under the rule, if the state appeals one of those posttrial orders, the incarcerated defendant who is charged with a bailable offense must be released, on motion, on the defendant's own recognizance (ROR). ROR can be denied only for "good cause stated" in writing to the trial court. Factors such as the likelihood of success on the merits and the likelihood that the defendant will leave the jurisdiction while the appeal is pending may constitute "good cause," but there are no reported cases on this issue. However, there may be statutory obstacles to the release. *State v. Jimenez*, 508 So.2d 1257 (Fla. 3d DCA 1987) (defendant convicted of cocaine traffcking, not a bailable offense; posttrial release pending state appeal not permitted because, under *F.S.* 924.19, state's appeal operated to stay order granting new trial).

E. [§ 17.59] Stay Of Mandate

At the conclusion of the appeal to the district court of appeal, a defendant or the state may seek discretionary review in the Florida Supreme Court. To obtain review, the party should move to stay issuance of the mandate; otherwise, the mandate is routinely entered and served on the parties by the clerk of the appellate tribunal 15 days after the date of the appellate court decision (although the time can be shortened or extended by the appellate court). *Fla.R.App.P.* 9.340(a). The timely filing of amotion for rehearing, clarifcation, or certifcation will delay issuance of the mandate until the motion is denied or, if granted, "until 15 days after the cause has been fully determined." *Rule* 9.340(b). The general rule is that a motion for stay of the mandate must be filed, if at all, during the 15-day period after an opinion is issued, *State ex rel. Price v. McCord*, 380 So.2d 1037 (Fla. 1980). But the Second District in *State v. Miyasoto*, 805 So.2d 818 (Fla. 2d DCA 2001), explained that it did "not regard *[Price v.] McCord* as controlling precedent in cases other than civil cases involving final money judgments" and would exercise its discretion to withhold or withdraw its mandate while a party actively sought review in criminal cases.

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FNd1. Mr. Scherker, Ms. Rodriguez, and Ms. McNulty authored the section on civil stays, and Ms. Wear authored the section on criminal stays.

End of Document

No. _____

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY AND
LIGGETT GROUP LLC,

Petitioners,

v.

FINNA A. CLAY, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JANIE MAE CLAY,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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R. J. Reynolds Tobacco Company

Exhibit G

RULE 29.6 STATEMENT

Petitioner R. J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc. ("RAI"), a publicly traded corporation. Brown & Williamson Holdings, Inc., and Invesco Ltd. hold more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through Brown & Williamson Holdings, Inc.

Petitioner Liggett Group LLC is a Delaware limited liability company and is a wholly owned, indirect subsidiary of Vector Group Ltd. Vector is the only publicly held company that owns 10% or more of the membership interest in Liggett. Vector is publicly traded on the New York Stock Exchange (NYSE: VGR). No publicly held company owns 10% or more of Vector's stock.

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, Petitioners R. J. Reynolds Tobacco Company and Liggett Group LLC respectfully request a sixty-day extension of time, up to and including September 4, 2012, to file petitions for writs of certiorari to the District Court of Appeal of Florida, First District, to review *R.J. Reynolds Tobacco Co. v. Clay*, 2012 WL 206369 (Fla. Dist. Ct. App. Jan. 25, 2012) (No. 1D10–5544). The court of appeal entered judgment on January 25, 2012, and it denied a timely filed motion for rehearing on April 4, 2012. (Copies of the opinion and order denying further review are attached.) Because the decision of the First District was a per curiam affirmance, the Florida Supreme Court lacked jurisdiction to review it. *See, e.g., Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Accordingly, the First District was the highest state court from which a decision could be had. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852–53 (2011); *Clark v. Arizona*, 548 U.S. 735, 746–47 (2006). The time to file petitions for certiorari will otherwise expire on July 3, 2012. This Application is timely because it has been filed at least ten days prior to that date.

2. This case concerns the limits that the Fourteenth Amendment's Due Process Clause places on state preclusion law. Like thousands of other cases currently pending in Florida, this case arises from a statewide class action decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). During the

Engle trial, the plaintiff smokers argued that the defendants, major cigarette manufacturers including Reynolds and Liggett, had sold defective cigarettes, committed acts of negligence, and fraudulently concealed information about the health and addiction risks of smoking. The *Engle* class presented numerous alternative allegations of defect, negligence, and concealment, many of which applied only to certain types of cigarettes and time periods. The *Engle* jury found that each defendant had sold defective cigarettes, committed acts of negligence, and concealed information, but its verdict did not specify which of the many alternative allegations it had adopted, rejected, or simply failed to consider. The Supreme Court of Florida decertified the class action but stated that these general findings were entitled to "res judicata effect" in subsequent suits brought by former class members. *Id.* at 1254. In the wake of that ruling, thousands of plaintiffs filed such individual actions, which are now commonly referred to as "*Engle* progeny" cases.

3. In this case, the First District Court of Appeal entered a summary affirmance based on its earlier decision in *R. J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010). In *Martin*, the First District interpreted *Engle* automatically to establish the "'conduct' elements of the claims asserted by the class" in each and every *Engle* progeny case, without any inquiry into whether the *Engle* jury had actually decided the specific issues for which the progeny plaintiff seeks preclusion. *See* 53 So. 3d at 1067–69. The *Martin* court did not dispute that the *Engle* verdict could have rested on allegations of defect, negligence, and concealment that would *not* encompass the cigarettes at issue in that case.

Instead, the court held that it was enough, for preclusion purposes, that the *Engle* jury *reasonably could have found* that the cigarettes at issue in any particular progeny case had been defectively designed, negligently designed or marketed, and marketed through fraudulent concealment. *Id.* at 1068–69. As a result, the plaintiff in *Martin* recovered more than $28 million, and the plaintiff in this case recovered more than $20 million, without either proving essential elements of the claims or showing that the *Engle* jury had in fact established those elements.

4. The First District's lax preclusion standard sharply conflicts with the standard this Court announced in *Fayerweather v. Ritch,* 195 U.S. 276 (1904). *Fayerweather* held as a matter of due process that if a prior verdict could have rested upon "distinct" theories, "any one of which would justify the verdict," then "the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *Id.* at 307; *see id.* at 298–99. The First District's standard also departs from a "basic procedural protection[ ] of the common law," *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430 (1994), that has been universally followed both at the time of the adoption of the Fourteenth Amendment and today. Like *Fayerweather,* "all the well considered authorities, ancient and modern," have held that a court cannot preclude litigation of an issue absent an "inevitable" inference that the issue has been decided against the party seeking to litigate it. *Burlen v. Shannon,* 99 Mass. 200, 203 (1868).

5. Good cause exists for this requested extension. Of the thousands *Engle* progeny cases pending in Florida, approximately 65 have already been tried to

verdict. *See* Affidavit of Thomas Adams, Exhibit 1, *Townsend v. R.J. Reynolds Tobacco Co.*, No. 01-2008-CA-003978 (Alachua, Fla. Cir. Ct.) (May 7, 2012) (copy attached). These cases are in various post-trial and appellate stages, and require significant amounts of time and attention for briefing and oral argument in individual cases, and for coordination across cases. The undersigned counsel of record has general supervisory responsibility for Reynolds' entire *Engle* progeny appellate docket, which presently includes approximately four dozen pending or imminent appeals. In addition, counsel of record will present argument in one of these appeals in mid-July, and in another of them likely to be re-scheduled for argument in July or August. Counsel also has significant commitments apart from *Engle* progeny litigation, including a major new representation of the State of Florida in litigation brought by the United States Department of Justice to prevent Florida from removing noncitizens from its voter rolls prior to the November presidential election. Finally, counsel has significant family commitments over the next month attending to his wife and second child, who was born on June 13, 2012.

In addition, co-counsel has significant commitments necessitating an extension including the filing of a Petition for Certiorari in a case involving a challenge to the constitutionality of the Defense of Marriage Act, a Petition for Certiorari in a significant tax case with an extended deadline of July 9, 2012, a Petition for Certiorari in a significant securities case with a deadline of July 17, 2012, and an upcoming argument in the Eleventh Circuit.

In addition, the Florida Supreme Court is actively considering, on an expedited basis, the due-process question presented in this case. In *Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002 (Fla. Dist. Ct. App. 2012), the Second District Court of Appeal certified this question as one of great public importance warranting review by the Florida Supreme Court:

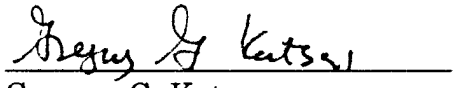
> Does accepting as res judicata the eight Phase I findings approved in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), violate the tobacco companies' due process rights guaranteed by the Fourteenth Amendment of the United States Constitution?

Douglas, 83 So. 3d at 1011. On May 15, 2012, the Florida Supreme Court accepted jurisdiction to resolve that question in *Douglas* and established a highly expedited schedule under which all merits briefing was completed on June 18, 2012. (A copy of the Florida Supreme Court's order accepting review in *Douglas* is attached.) Given the anticipated decision in *Douglas*, an extension here may "permit[ ] both the Court and the parties to consider the certiorari possibilities of the case in light of that new event." Gressman, *et al.*, *Supreme Court Practice* 404 (9th ed. 2007); *see also id.* ("The imminence of a decision in another specified proceeding ... that may conflict with the ruling below or otherwise provide a new or additional reason for the grant of certiorari, or render the issue of less or no importance, may be 'good cause' for an extension.").

Finally, unlike normal petitioners seeking review of a single proceeding below, counsel for Reynolds, Liggett, and other defendants affected by the *Engle* progeny litigation need additional time to coordinate their positions in order to make the Court's review as efficient as possible.

WHEREFORE, Petitioners respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for sixty days, up to and including September 4, 2012.

Respectfully submitted,



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Counsel for Petitioner
R. J. Reynolds Tobacco Company

Dated: June 22, 2012

ATTACHMENTS

District Court of Appeal of Florida,

First District.

R.J. REYNOLDS TOBACCO COMPANY and Liggett Group, L.L.C.,
Appellants/Cross–Appellees,

v.

Finna CLAY, as Personal Representative of the Estate of Janie Mae Clay,
Appellee/Cross–Appellant.

No. 1D10–5544.

Jan. 25, 2012.

An appeal from the Circuit Court for Escambia County. Terry D. Terrell, Judge.

Gregory G. Katsas and Donald B. Ayer of Jones Day, Washington, DC; Stephanie E. Parker, John F. Yarber, and John M. Walker of Jones Day, Atlanta, GA; Charles F. Beall, Jr., and Larry Hill of Moore, Hill & Westmoreland, P.A., Pensacola; Kelly Anne Luther and Michael P. Rosenstein of Kasowitz, Benson, Torres, & Friedman, Miami; Karen H. Curtis of Clarke, Silvergate, Campbell, Miami; Pamela Jo Bondi, Attorney General, Scott D. Makar, Solicitor General, and Louis F. Hubener, III, Chief Deputy Attorney General, Tallahassee, for Appellants/Cross–Appellees.

John S. Mills and Gregory J. Philo of The Mills Firm, P.A., Tallahassee; David J. Sales of David J. Sales, P.A., Jupiter; William A. Norton of Searcy Denney, Tallahassee; T. Hardee Bass and Brian R. Denney of Searcy, Denney, Scarola, Barnhart & Shipley, West Palm Beach, for Appellee/Cross–Appellant.

PER CURIAM.

AFFIRMED. *See R.J. Reynolds Tobacco Co. v. Martin,* 53 So.3d 1060 (Fla. 1st DCA 2010).

DAVIS, LEWIS, and ROBERTS, JJ., concur.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850) 488-6151

April 04, 2012

CASE NO.: 1D10-5544
L.T. No.: 2007 CA 3020

R. J. Reynolds Tobacco Company and Liggett etc.	v.	Finna Clay, as Personal Representative etc.
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed February 28, 2012, for rehearing or stay of mandate is denied.

Appellant's motion filed March 23,2012, to accept joinder is denied.

Appellant's notice of joinder filed March 23, 2012, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Charles F.Beall, Jr. John S.Mills Louis F.Hubener, I I I

William ANorton	Scott D.Makar, Solicitor General	David J.Sales
Kelly Anne Luther	Larry Hill	Stephanie E. Parker
John F.Yarber	John M.Walker	Karen H.Curtis
T.Hardee Bass	Gregory G Katsas	Brian R. Denney
Michael P.Rosenstein	Donald B.Ayer	

jm

s/ Jon S. Wheeler

Jon S. Wheeler, Clerk

Supreme Court of Florida

TUESDAY, MAY 15, 2012

CASE NO.: SC12-617
Lower Tribunal No(s).: 2D10-3236,
08-8108

PHILIP MORRIS USA, INC., ET AL.vs. JAMES L. DOUGLAS, ETC.

Petitioner(s) Respondent(s)

The Court accepts jurisdiction of this case. Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

Petitioner's initial brief on the merits shall be **filed** on or before May 30, 2012; respondent's answer brief on the merits shall be **filed** on or before June 11, 2012, and petitioner's reply brief on the merits shall be **filed** on or before June 18, 2012. Please file an original and seven copies of all briefs.

No extensions of time shall be granted, except in extreme circumstances.

Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

The Clerk of the Second District Court of Appeal shall file the original record which shall be properly indexed and paginated on or before June 15, 2012. The record shall include the briefs filed in the district court separately indexed.

CANADY, C.J., PARIENTE, LABARGA, and PERRY, JJ., concur.
POLSTON, J., concurs and would consider without oral argument.

A True Copy

Thomas D. Hall
Clerk, Supreme Court

aa
Served:

ROBERT CRAIG MAYFIELD
TROY ALLEN FUHRMAN
KELLY ANNE LUTHER
STEPHANIE ETHEL PARKER
BENJAMIN H. HILL, III
WAYNE LEE THOMAS
RAOUL G. CANTERO, III
WILLIAM P. GERAGHTY
JENNIFER MARIE VOSS
GARY L. SASSO
KAREN HAYNES CURTIS
GREGORY GEORGE KATSAS
CELENE HARRELL HUMPHRIES
BRUCE HOWARD DENSON
STEVEN L. BRANNOCK
KENT G. WHITTEMORE
HOWARD M. ACOSTA
TYLER K. PITCHFORD
HON. JAMES BIRKHOLD, CLERK

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

LYANTIE TOWNSEND, as Personal Representative Of the Estate of FRANK TOWNSEND, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY, Defendant.	Case No.: 01-2008-CA-003978 Division K

AFFIDAVIT OF THOMAS R. ADAMS

STATE OF NORTH CAROLINA:

FORSYTH COUNTY:

THOMAS R. ADAMS, being duly sworn, deposes and says:

1. I am over the age of 18 years. I am currently the Executive Vice President, Chief Financial Officer and Chief Information Officer of Reynolds American, Inc. and RAI Services Company.

2. The statements contained in this affidavit are based on my personal knowledge and my review of business records maintained by my employer regarding Engle progeny litigation in the Florida courts.

3. On September 13, 2009, Judge Terrell entered final judgment against R.J. Reynolds Tobacco Company in the amount of $25,000,000 in punitive damages in the case of Mathilde C. Martin v. R.J. Reynolds Tobacco Company, 2007-CA-2520 (an Escambia County Engle progeny case). On April 27, 2012, R.J. Reynolds Tobacco Company paid the punitive damages award (plus $4,985,594.92 in interest) in that case.

4. On March 8, 2010, Judge Terrell entered final judgment against R.J. Reynolds Tobacco Company in the amount of $2,000,000 in punitive damages in the case of Carolyn Gray v. R.J. Reynolds Tobacco Company, 2007-CA-2773 (an Escambia County Engle progeny case). On April 27, 2012, R.J. Reynolds Tobacco Company paid the punitive damages award (plus $248,929.79 in interest) in that case.

5. On March 23, 2010, Judge Roundtree entered final judgment against R.J. Reynolds Tobacco Company in the amount of $12,500,000 in punitive damages in the case of Amanda Jean Hall v. R.J. Reynolds Tobacco Company, 2007-CA-5098 (an Alachua County Engle progeny case). On April 27, 2012, R.J. Reynolds Tobacco Company paid the punitive damages award (plus $1,547,591.98 in interest) in that case.

6. R.J. Reynolds Tobacco Company has paid the sum of the awards listed in paragraphs 3 – 5 above, *i.e.*, $39,500,000.00 in punitive damages (plus $6,782,116.68 in interest) in Engle progeny cases.

7. The chart attached hereto as Exhibit 1, which displays punitive damages awards entered by various trial courts against tobacco companies in Engle progeny cases, is complete and accurate as of the date of this Affidavit.

FURTHER AFFIANT SAYETH NOT

Thomas R. Adams

Sworn to and subscribed before me
this 7th day of May, 2012:

Julie G. Barwick
Notary's Signature

My Commission Expires: 4-20-2016

JULIE G. BARWICK
NOTARY PUBLIC
FORSYTH COUNTY
NORTH CAROLINA
My Commission Expires April 20, 2016

No. _____

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY AND
LIGGETT GROUP LLC,

Petitioners,

v.

FINNA A. CLAY, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JANIE MAE CLAY,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I certify that a copy of the Petitioners' *Application for Extension of Time to File a Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District* was served via overnight mail on all parties required:

David J. Sales
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

John S. Mills
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Jacksonville, Florida 32202

William A. Norton
SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY, P.A.
Towle House, 517 North Calhoun Street
Tallahassee, Florida 32301

Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Gregory G. Katsas

GREGORY G. KATSAS
Counsel for Applicant

Date: June 22, 2012