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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 PETITION TO AMEND RULE 7,
11 ARIZONA RULES OF CIVIL
12 APPELLATE PROCEDURE

Supreme Court No. R-11-0019

**Comment of the State Bar of Arizona
on Petition to Amend Rule 7, Arizona
Rules of Civil Appellate Procedure**

13 The Administrative Office of the Courts has petitioned this Court to amend
14 Rule 7 of the Arizona Rules of Civil Appellate Procedure to conform its
15 requirements regarding the posting of supersedeas bonds to the requirements of
16 A.R.S. § 12-2108, which establishes the manner in which the amount of a
17 supersedeas bond is determined. The State Bar of Arizona, upon the
18 recommendation of the Appellate Practice Section, while taking no position
19 regarding the adoption or rejection of the petition, submits the following comment.

20 **COMMENT**

21 The State Bar of Arizona takes no position on the adoption or rejection of
22 Petition No. R-11-0019. Because the petition conforms Rule 7 to the newly-
23 enacted statute, which lowers the amounts required to post a supersedeas bond to
24 forestall the execution of a judgment during appeal, it favors defendants over
25 plaintiffs. Because the members of the Appellate Practice Section represent
26 plaintiffs as well as defendants on appeal, the Section wishes to remain neutral
regarding the petition. The Section also notes that whether A.R.S. § 12-1208 is a

1 proper exercise of the Legislature’s authority to enact substantive law or is an
2 unconstitutional infringement of the Arizona Supreme Court’s procedural
3 rulemaking authority has not been examined. *See, e.g., Seisinger v. Siebel*, 220
4 Ariz. 85, 88-96, 203 P.3d 483, 486-94 (2009) (resolving whether enactment of
5 statute governing standard of proof of care in medical malpractice cases conflicted
6 with Arizona Rules of Evidence and violated separation of powers); *Lear v. Fields*,
7 226 Ariz. 226, 233, 245 P.3d 911, 918 (App. 2011) (holding that statute setting
8 standards for admission of expert testimony in all cases was unconstitutional
9 violation of separation of powers because “it does not alter any particular
10 substantive law” but “‘engulfs’ and supplants the existing rule with which it
11 conflicts”).

12 The State Bar notes, however, that the proposed amendment to Rule 7
13 does not eliminate every conflict between § 12–1208 and Rule 7. Section 12–1208
14 requires a court to set the amount of the bond at the least of (1) the total amount of
15 damages, excluding punitive damages; (2) 50 percent of the appellant’s net worth;
16 or (3) \$25 million. The amended rule, as proposed, while adopting these limits,
17 nevertheless allows the court to consider, “[i]n determining the amount of the
18 bond,” other factors, including “whether there is other security for the judgment, or
19 whether there is property in controversy which is in the custody of the sheriff or the
20 court.” If a court must set the bond according to the least of the three limits set
21 forth above, it has no authority to set the bond at some other amount based on any
22 factor.

23 Of course, §§ 12–1208(B) and (C) allow a court to vary the amount of the
24 bond under very limited circumstances: (1) the court may raise the amount up to
25 the amount of the judgment if the appellee proves by clear and convincing evidence
26 that the appellant “is intentionally dissipating assets outside the ordinary course of

1 business"; or (2) the court may lower the amount if the appellant proves by clear
2 and convincing evidence that posting a bond in the statutory amount would likely
3 cause "substantial economic harm." But in either case, the court's discretion is
4 tightly prescribed based on established conditions that are inconsistent with the
5 Rule's grant of authority to consider, "among other things," whether the judgment
6 has other security and whether the property in controversy is in the custody of the
7 sheriff or the court.

8 Because the petition's goal is to conform Rule 7 to the statute,
9 conformation requires the deletion of this inconsistent paragraph. The attached
10 Appendix A indicates, by double strikethrough, the paragraph that should be
11 deleted.

12 RESPECTFULLY SUBMITTED this 5th day of October, 2011.

13
14 
15 _____
16 John A. Furlong
17 General Counsel

16 Electronic copy filed with the Clerk
17 of the Supreme Court of Arizona
18 this 5th day of October, 2011.

19 By: Kathleen A. Lundgren
20

21 A copy was mailed to:

22 David K. Byers, Administrative Director
23 Administrative Office of the Courts
24 1501 W. Washington Street, Ste. 411
25 Phoenix, Arizona 85007

25 this 5th day of October, 2011.

26 By: Kathleen A. Lundgren

APPENDIX A

Proposed amendment to Rule 7(a), Ariz. R. Civ. App. P.

(Proposed deletion indicated by ~~double strikethrough~~.)

Rule 7. Stay of Proceedings to Enforce a Judgment

(a) Stay Upon Appeal; Supersedeas Bond.

(1) Filing the Bond. Except in cases involving custody of children, whenever an appellant entitled thereto desires a stay on appeal, he may obtain a stay by filing a supersedeas bond in the superior court in accordance with any applicable statute and these rules. The bond may be filed before or after the filing of the notice of appeal. The amount of the bond may be determined upon stipulation or upon motion. A hearing on such motion shall be held forthwith. The court may make any further order, other than or in addition to the bond, appropriate to preserve the status quo or the effectiveness of the judgment. The stay is effective when the supersedeas bond, as stipulated or as ordered by the court, is filed, and when appellant has complied with all other conditions imposed by the court ~~have been complied with.~~

The superior court, in its discretion, may determine the amount of the bond ex parte upon submission to the court of an affidavit stating:

(a) that appellant has made a good faith attempt to obtain a stipulation from the other parties; and

(b) the efforts, if any, which have been made to give notice, and the reasons why it is not feasible under the circumstances to give the other parties the opportunity to be heard before the setting of the bond.

(2) Amount of the Bond. ~~The bond shall be conditioned for the satisfaction in full of the judgment remaining unsatisfied, together with costs, interest, and any damages reasonably anticipated to flow from the granting of the stay including damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and costs, interest, and damages as the appellate court may adjudge and award, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security or imposes conditions other than or in addition to the bond.~~ The amount of the bond shall be set as the lesser of the following:

- (i) The total amount of damages awarded, excluding punitive damages;
- (ii) Fifty percent of the appellant's net worth;
- (iii) Twenty-five million dollars.

Notwithstanding the foregoing, the court may require an appellant to post a bond in an amount up to the full amount of the judgment if an appellee proves by clear and convincing evidence that the appellant is intentionally dissipating assets outside the ordinary course of business to avoid payment of a judgment; or the trial court may lower the bond amount to an amount that will not cause an appellant substantial economic harm if the appellant proves by clear and convincing evidence that the appellant is likely to suffer substantial economic harm if required to post a bond in the amount set pursuant to the provisions of (i), (ii), or (iii) above.

~~In determining the amount of the bond, the court shall consider, among other things, whether there is other security for the judgment, or whether there is property in controversy which is in the custody of the sheriff or the court.~~

(3) *Objections to the Bond.* Not later than 10 days after the bond is served, any party may file objections to the bond, specifying the particulars in which it is claimed that the bond is erroneous or defective, or that the surety is insufficient. If the amount of the bond has been determined ex parte, then the party may also object to the sufficiency of the amount of the bond. All errors, defects, or insufficiencies in a supersedeas bond not specified in the objections are waived. The superior court shall hold a hearing within 10 days after service of the objections.

(b) through (d): [No changes.]