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Schizophrenia in Federal Judgment Enforcement: Registration of Foreign Judgments Under 28 U.S.C. § 1963

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I. Introduction

Nothing is more frustrating to a victorious plaintiff than finding after the entry of judgment that the defendant has emptied his pockets. This article focuses on one provision of the federal judicial code that inadvertently may make it easier for a defeated litigant to do this.

Ironically, 28 U.S.C. § 1963 ("Section 1963") was enacted to assist a judgment creditor in federal court to collect his judgment by allowing him to register and enforce it in any other United States district court. The statute states:

A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.¹

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1 28 U.S.C. § 1963 ("Section 1963") further provides: "A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien." 28 U.S.C. § 1963 (1976).

The mechanics of registering a judgment under Section 1963 are quite simple. No formal request is necessary. The prevailing litigant asks the clerk of the court to issue a certified copy of the judgment. Since FED. R. APP. P. 4(a), 28 U.S.C. app. 353 (1976), gives a judgment debtor 30 days within which to file a notice of appeal, the clerk normally waits 30 days from the date of entry of judgment. If no appeal has been noted within this 30-day period, the clerk issues a certified copy of the judgment. When issuing the certified copy of the judgment, the clerk also certifies that no appeal has been taken and that the time for appeal has expired. The clerk in the foreign district court then registers the judgment by entering the pertinent provisions of the sister court's judgment on its own judgment docket. Note, *Registration of Federal Judgments*, 42 IOWA L. REV. 285, 288-89 (1957).

Upon filing, the foreign judgment becomes a judgment of the court in which it is filed.

Because the statute requires that the judgment be "final by appeal or expiration of time for appeal," it is often unavailable in the circumstances where it is needed most—against a judgment debtor who appeals in order to gain time to dispose of his assets.²

Judicial interpretation of the "final by appeal" requirement for registration can be termed schizophrenic. Some courts have applied the requirement literally. Others, mostly in unreported cases, have refused to apply it where the judgment debtor has not obtained a stay of execution conditioned upon his posting a supersedeas bond. Recently, however, two courts of appeals published lengthy opinions adopting a literal interpretation of the "final by appeal" requirement.³ As a result, it is unlikely that federal judgments will be registrable in the future when an appeal is pending even though no stay

The creditor can then execute on it in any manner allowed under the Federal Rules of Civil Procedure, 28 U.S.C. app. 388 (1976), and the laws of the state in which it is registered. Section 1963 does not require that the judgment creditor give the debtor notice of the registration. This has been the subject of some criticism. See Note, *The New Federal Judgment Enforcement Procedure*, 50 COLUM. L. REV. 971 (1950).

There are two other federal registration statutes, 28 U.S.C. § 1963A (Supp. IV 1980) and 28 U.S.C. § 2508 (1976). Section 1963A was enacted in 1980 to permit registration in United States district courts of money or property judgments obtained in the Court of International Trade. Its language is almost identical to Section 1963. To date, no reported cases have interpreted or applied Section 1963A.

Section 2508 permits, inter alia, registration in district courts of a judgment by the new United States Claims Court (formerly the Court of Claims) in favor of the United States. It provides: "The transcript of such a judgment, filed in the clerk's office of any district court, shall be entered upon the records, and be a judgment of such district court and enforceable as other judgments." Thus, unlike Sections 1963 and 1963A, Section 2508 does not require that a judgment be "final by appeal" before it is registrable. Although no reported case has addressed the issue, presumably the United States could enforce a judgment from the Claims Court during an appeal if such appeal were filed without the posting of a supersedeas bond.

2 See, e.g., *Goldman v. Meredith*, 596 F.2d 1353 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979), where a judgment creditor, upon learning that the judgment debtor had transferred or otherwise disposed of a substantial portion of his assets, sought to register a judgment from the Eastern District of Missouri in the United States District Court for the District of Columbia pursuant to Section 1963. The Eighth Circuit noted that the clerk of the United States District Court for the District of Columbia had refused to register the judgment because it was not "final by appeal." 596 F.2d at 1356; see also *Beebe v. Auslander*, 629 F.2d 985 (4th Cir. 1980) (affirming a district court order holding a defendant in criminal contempt of court for liquidating all of his assets and investing the proceeds in an overseas corporation soon after the entry of judgment); *Olympic Ins. Co. v. H.D. Harrison, Inc.*, 413 F.2d 973, 974 (5th Cir. 1969) (per curiam) (District Court for the Eastern District of Louisiana entered a substantial judgment against a defendant who had assets only in Texas. The judgment debtor delayed registration and execution of the judgment in Texas for many months simply by filing an appeal in which the Fifth Circuit could "find no possible merit.").

3 *Urban Indus., Inc. v. Thevis*, 670 F.2d 981 (11th Cir. 1982); *Air Transport Ass'n of America v. Professional Air Traffic Controllers Org. (In re PATCO)*, 699 F.2d 539 (D.C. Cir. 1983) (PATCO is the recognized abbreviation for Professional Air Traffic Controllers Organization).

of execution has been issued and no supersedeas bond has been posted. To protect victorious parties, Section 1963 should be amended to delete the "final by appeal" requirement.

A. *Appeals and Stays—The Problem Under Section 1963*

In the federal court system, if a losing party refuses to pay a money judgment entered against him, the prevailing party is entitled to collect by judicial process.⁴ But a judgment debtor who wishes to appeal can prevent enforcement of the prevailing party's judgment by obtaining a stay of execution, pursuant to Federal Rule of Civil Procedure 62 ("Rule 62") or Federal Rule of Appellate Procedure 8 ("Appellate Rule 8").⁵ In practice, either procedure normally entails

4 FED. R. CIV. P. 69(a) authorizes a holder of a federal money judgment to collect the judgment in any manner allowed under the laws of the state in which the federal court sits. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

28 U.S.C. app. 500 (1976). The rule also permits discovery in aid of execution in the manner provided by the federal rules or in the manner provided by the practice of the state. Thus, the familiar forms of execution—levy, attachment, sale, and garnishment—are available when authorized by state statute. *See, e.g.*, *Green v. Benson*, 271 F. Supp. 90 (E.D. Pa. 1967) (authorizing garnishment); *Weir v. United States*, 339 F.2d 82 (8th Cir. 1964) (affirming execution sale under Arkansas procedure); *Marcus v. Lord Elec. Co.*, 43 F. Supp. 12 (W.D. Pa. 1942) (authorizing attachment of bank accounts).

5 FED. R. CIV. P. 62 sets forth various circumstances in which a stay is available. Section (a) provides an automatic ten-day stay for execution from the date a judgment is issued. Its purpose is to give a defeated party time to determine what, if any, post judgment review is appropriate. 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 62.03 (1983). If no other stay has been obtained upon the expiration of this ten-day period, a prevailing litigant is entitled to execute on his judgment. *See Fong v. United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); *Van Huss v. Landsberg*, 262 F. Supp. 867 (W.D. Mo. 1967).

FED. R. CIV. P. 62(d) provides:

When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order following the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

28 U.S.C. app. 494 (1976).

A party taking an appeal from a federal district court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with the federal rules. *American Mfr. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S. Ct. 1, 3 (opinion of Harlan, C.J.) (stay granted), *cert. denied*, 385 U.S. 931 (1966); *In re Federal Facilities Realty Trust*, 227 F.2d 651, 655 (7th Cir. 1955); *Harris v. Briscoe*, 212 F.2d 619 (D.C. Cir. 1954); *Ivor B. Clark Co. v. Hogan*, 296 F. Supp. 407 (S.D.N.Y. 1969). However, in cases involving other than money judgments, granting a stay is a matter for the court's discretion. *See, e.g.*, *Dewey v. Reynolds Metals Co.*, 304 F. Supp. 1116 (W.D. Mich. 1969), *rev'd on other*

the judgment debtor's posting a supersedeas bond.⁶ Although a los-

grounds, 429 F.2d 324 (6th Cir. 1970) (During appeal a party is not entitled to a stay as a matter of right in an injunctive relief case.); *Beaver Cloth Cutting Mach., Inc. v. Maimin Co.*, 37 F.R.D. 47 (S.D.N.Y. 1964) (no automatic stay pending an appeal in a patent infringement case). If a district court denies an application for a stay pending appeal, FED. R. APP. P. 8(a) permits a judgment debtor to apply to the court of appeals for a stay or injunction. 28 U.S.C. app. 355 (1976).

6 *Fidelity & Deposit Co. of Maryland v. Davis*, 127 F.2d 780, 782 (4th Cir. 1942) ("[B]ond securing payment of a money judgment must be given, if . . . stay pending appeal is desired."); *Markowitz & Co. v. Toledo Metropolitan Hous. Auth.*, 74 F.R.D. 550, 551 (N.D. Ohio 1977) (Rule 62(d) "requires posting of a supersedeas bond to stay execution of the judgment. Only the United States is exempt from the bond requirement. FED. R. CIV. P. 62(e)."); *Slade v. Dickinson*, 82 F. Supp. 416, 419 (W.D. Mich. 1949) ("Under Procedural Rules 62(d) and 73(d) . . . a party appealing from a judgment . . . can stay proceedings . . . only by furnishing a supersedeas bond." Issuing an unsecured stay would "disregard the Federal Rules of Civil Procedure."); *see also Geddes v. United Fin. Group*, 559 F.2d 557, 560-61 (9th Cir. 1977) (District court erred in staying executions of money judgment for one year without attempting to justify stays under any provision of Rule 62.); *Marcelletti & Son Constr. Co. v. Millcreek Township Sewer Auth.*, 313 F. Supp. 920, 928 (W.D. Pa. 1970) (Rule 62 indicates a policy against unsecured stays beyond the time for filing a motion for new trial.); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 62.06 (1983) ("Under Rule 62(d), a party taking an appeal from a money judgment . . . can stay proceedings to enforce that judgment pending appeal by furnishing a supersedeas bond."); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2905 (1977) ("[A]bsen[t] stay obtained in accordance with Rule 62(d), the pendency of an appeal does not prevent the judgment creditor from acting to enforce the judgment."). *But see* *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 760 (D.C. Cir. 1980) ("Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, a full supersedeas bond should be the requirement in normal circumstances. . . ." In unusual circumstances, however, the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery."); *Trans World Airlines v. Hughes*, 314 F. Supp. 94 (S.D.N.Y. 1970), *rev'd on other grounds*, 409 U.S. 363 (1973) (Courts have inherent power in extraordinary circumstances to provide for the form and amount of security for stay pending appeal based on conditions existing in each case. Due to the potential size of the antitrust treble damage award, the court permitted the defendant to post security for a portion of the money judgment and secure the balance by maintaining a net worth at least three times the amount of the balance.); *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (Courts have discretion to require less than full supersedeas bond where judgment debtor presents adequate alternative assurances or where full bond would mean undue financial burden, and courts can restrain judgment debtor's financial dealings to provide alternative form of security for judgment creditor.); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973).

Prior to 1968, Rule 73(d) governed the conditions and amount of a supersedeas bond. The rule stated:

Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. *The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and 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 such costs, interest, and damages as the appellate court may adjudge and award. *When the judgment is for the recovery of money not otherwise secured, the*

ing party is not *required* to obtain a stay of execution in order to appeal,⁷ his failure to do so allows the prevailing party to execute on his judgment during the pendency of the appeal.⁸ Filing an appeal does not work an automatic stay in the federal courts. An appellant who wants a stay of execution must apply for one and generally post a supersedeas bond.⁹

Section 1963 stands in contrast to Rule 62 and Appellate Rule 8. Simply by filing an appeal without a supersedeas bond, a judgment debtor can obtain an automatic stay of execution as to assets in foreign districts which the judgment creditor seeks to reach via Section 1963. If a judgment debtor posts a supersedeas bond, the "final by appeal" requirement poses no problem for the judgment creditor because payment is secured by the bond. But if the debtor fails to post bond on appeal, the "final by appeal" requirement of Section 1963

amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court; the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for the delay [emphasis supplied].

The provisions in Rule 73(d) for costs, interest, and damages for delay make clear that the drafters intended that the judgment creditor be made whole.

Since 1968, there has been no Federal Rule of Civil Procedure governing the terms of supersedeas bonds. However, the old rule has been cited as a useful guide. *See, e.g.*, *Trans World Airlines v. Hughes*, 314 F. Supp. at 96; *Tully v. Kerguen*, 304 F. Supp. 1225, 1227 (D.V.I. 1969). Some districts have replaced former Rule 73(d) by local rules of court. *See, e.g.*, Local Rule 41 of the Southern District of New York, which requires that a supersedeas bond be in the amount of the judgment plus 11%.

7 *Dakota County v. Glidden*, 113 U.S. 222 (1885); *O'Hara v. MacConnell*, 93 U.S. 150 (1876); *Thorpe v. Thorpe*, 364 F.2d 692 (D.C. Cir. 1966); *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750 (9th Cir. 1969); *Holcomb v. Holcomb*, 209 F.2d 794 (D.C. Cir. 1954); *Porterfield v. Gerstel*, 222 F.2d 137 (5th Cir. 1955); *Koster & Wythe v. Massey*, 262 F.2d 60 (9th Cir. 1958).

8 *Hovey v. McDonald*, 109 U.S. 150 (1883); *American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245 (5th Cir. 1980); *In re Fed. Facilities Realty Trust*, 227 F.2d 651 (7th Cir. 1955); *Gullet v. Gullet*, 174 F.2d 531 (D.C. Cir. 1949).

9 *See Blackwelder v. Crooks*, 151 F. Supp. 26, 28 (D.D.C. 1957), where the court stated:

Rule 62 of the Federal Rules of Civil Procedure, 28 U.S.C.A. explicitly provides that when an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay. The necessary implication is that without giving a supersedeas bond or unless otherwise ordered by the Court, the order is not stayed, even though an appeal is pending. Otherwise a person could completely frustrate judicial proceedings by disobeying an order of the Court during the pendency of an appeal without giving any security that it will be complied with in the event of affirmance.

allows him to delay or escape payment by transferring his assets to another jurisdiction during the appeal. The judgment creditor is then in the anomalous situation of being able to attach and sell assets of the debtor located within the district in which the judgment was entered; but at the same time, because an appeal is pending, he cannot register his judgment in another district.

Although there is scant legislative history for Section 1963,¹⁰ the

10 Section 1963 was enacted as part of the 1948 reform of the Judicial Code. The statutory language of Section 1963 is substantially similar to that of Proposed Rule 77, "Registration of Judgments in Other District Courts," which was recommended in 1937 by the Supreme Court's Advisory Committee on Federal Rules for Civil Procedure. Proposed Rule 77 was never promulgated by the Supreme Court as a rule of procedure. The reason for this is uncertain, but some commentators believe the Supreme Court may have considered a registration statute to affect substantive rights and thus be outside its procedural rulemaking authority. See 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 1.04[2] (1983) (citing Memorandum in Support of Rule 77, at 14, U.S. Supreme Court Advisory Committee on Rules for Civil Procedures, Materials 1934-1939) (Papers of Edgar B. Tolman, Univ. of Chicago Law School Library). Eleven years later, in 1948, Congress enacted Section 1963.

As noted in *Ohio Hoist Mfg. Co. v. LiRocchi*, 490 F.2d 105, 108-09 (6th Cir. 1974), except for a statement by Professor James William Moore, there is no legislative history specifically on Section 1963. On Mar. 7, 1947, Professor Moore made the following statement before a subcommittee of the House Judiciary Committee during hearings on H.B. 3214:

[Section] 1963 provides for the registration of Federal judgments for the recovery of money or property in any other Federal district court. Provision for the registration of judgments in other courts is possible in some 46 British jurisdictions, and has been supported as to all judgments, State as well as Federal, by the American Bar Association, which has advocated congressional legislation in this matter since 1927.

The Supreme Court's advisory committee recommended a rule for the recognition of Federal Judgments in 1937, but the Supreme Court did not promulgate the rule. While this may or may not be within the competence of the rule-making power, it is certainly within the competence of Congress at this time to provide for the registration of Federal judgments.

Hearings on H.B. 3214 Before a Subcommittee of the House Comm. on the Judiciary, 80th Cong., 1st Sess., ser. 2, at 28 (1947), quoted in *Ohio Hoist Mfg. Co. v. LiRocchi*, 490 F.2d at 109.

The original draft of the Supreme Court Advisory Committee Proposed Rule 77 did not contain any language precluding registration while an appeal was pending. It was only in the final report that such language was added. Proposed Rule 77 appeared in Advisory Committee's report of Apr., 1937, as follows:

A judgment entered in any district court may be registered in any other district court by filing therein an authenticated copy of the judgment. When so registered the judgment shall have the same effect and like proceedings for its enforcement may be taken thereon in the court in which it is registered as if the judgment had been originally entered by that court. If in the court in which the judgment was originally entered, the judgment has been satisfied in whole or in part or if an order has been made modifying or vacating it or affecting or suspending its operation, the party procuring the registration shall and any other party may file authenticated copies of the satisfaction or order with the court in which the judgment is registered. This rule shall not be construed to limit the effect of the Act of February 20, 1905, c. 592, § 20 (33 Stat. 729), as amended, U.S.C., Title 15, § 100; or the Act of March 4, 1909, c. 320, §§ 36 and 37 (35 Stat. 1084), U.S.C., Title 17, §§ 36 and 37; or § 56 of

courts agree that its self-evident purpose is to provide a simple, inexpensive and expeditious means to enforce federal money judgments.¹¹ As one court succinctly stated:

It seems to be conceded that the purposes of § 1963 were to simplify and facilitate the enforcement of federal judgments, at least those for money, to eliminate the necessity and expense of a second lawsuit, and to avoid the impediments, such as diversity of citizenship, which new and distinct federal litigation might otherwise encounter.¹²

Unfortunately, this purpose has not been fully achieved.

II. Enforcement of Judgments By Independent Action

A. *Traditional Enforcement of Judgments in Another Jurisdiction by a Separate Action*

Prior to September 1, 1948, the effective date of Section 1963, a successful litigant in federal court who wanted to execute on a judgment in another district had to bring a separate action on the judgment.¹³ This procedure remains available today as an alternative to

the Judicial Code, U.S.C., Title 28, § 117; or to authorize the registration elsewhere of an order or a judgment rendered in a divorce action in the District of Columbia. But in its final report, issued in Nov., 1937, the Advisory Committee modified the first sentence of Proposed Rule 77 to read: "A judgment entered in any district court and which has become final through expiration of the time for appeal or by mandate on appeal may be registered in any other district court by filing therein an authenticated copy of the judgment." The only recorded explanation for this change is an Advisory Committee note found in the Final Report which states simply: "The Committee believed that a judgment should not be registered in another district while there is any chance of modification on appeal." Final Report of the Advisory Committee on Rules for Civil Procedure, Nov., 1937, at 49.

For further discussion of the history of 28 U.S.C. § 1963, see *Ohio Hoist Mfg. Co. v. LiRocchi*, 490 F.2d at 109; LEGISLATIVE HISTORY OF TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE (R. Mersky & J.M. Jacobstein ed. 1971).

11 *See, e.g.*, *Hanes Supply Co. v. Valley Evaporating Co.*, 261 F.2d 29, 30 (5th Cir. 1958) ("[T]he registration statute is intended to provide all the benefits deriving from a local judgment on a foreign judgment without subjecting either plaintiff or defendant to the expense of a second lawsuit."); *Coleman v. Patterson*, 57 F.R.D. 146, 149 (S.D.N.Y. 1972) ("The statute's purpose . . . is to simplify and facilitate collection on valid judgments."); *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union*, 128 F. Supp. 697, 700 (D. Hawaii 1955) ("[T]he plain and simple purpose of the statute is enforcement of the original judgment."); *see also* *Ohio Hoist Mfg. Co. v. LiRocchi*, 490 F.2d at 107; *Tommills Brokerage Co., v. Thon*, 52 F.R.D. 200, 202 (D.P.R. 1971); *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963); *Squeeze-A-Purse-Corp. v. Stiller*, 31 F.R.D. 261, 263 (S.D.N.Y. 1962); 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 1.04[2](1983); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 69.03[3](1983).

12 *Stanford v. Utley*, 341 F.2d 265, 270 (8th Cir. 1965) (citation omitted).

13 *See, e.g.*, *Slade v. Dickinson*, 82 F. Supp. 416 (W.D. Mich. 1949) (judgment from United States District Court for the Southern District of New York sued on in the Western District of Michigan); *General Fin. Corp. v. Penn Nat'l Hardware Mut.*, 17 F.2d 383 (M.D.

registration under Section 1963. The judgment creditor files a complaint in the foreign federal district, attaching a copy of the original judgment; he then moves for summary judgment. Since an enforcement action is considered a new suit, the judgment creditor must obtain personal jurisdiction over the debtor in the foreign district.

If a debtor seeks to avoid payment of a judgment, obtaining personal jurisdiction over him can prove difficult, even with the help of a long-arm statute. If the judgment debtor's only connection with the foreign jurisdiction is that he has assets there, the judgment creditor must first find the property in the foreign jurisdiction to sustain personal jurisdiction. Moreover, an enforcement action may require employing attorneys admitted to the bar of the foreign district court. The defendant, of course, has available the usual techniques for delaying entry of the new judgment.

On occasion, the question has arisen whether a party can bring an action on a judgment in federal court while an appeal is pending on the original judgment. In answering this question, the court does not distinguish between an action brought on its own judgment or on one from another federal court. In either situation, the federal court looks to the status of the case in its original jurisdiction. If a stay of execution is in effect in the original jurisdiction during the appeal, the federal court does not entertain an action on the judgment. But if the original judgment is not stayed, the federal court permits an action on it.¹⁴

An appeal alone, however, is insufficient to stay an execution of a judgment in a foreign jurisdiction. A judgment debtor can obtain a stay of execution only by obtaining a writ of supersedeas and post-

Pa. 1927) (judgment from the Western District of Texas sued on in the Middle District of Pennsylvania).

¹⁴ See *A. Coolot Co. v. L. Kahner & Co.*, 140 F. 836, 838 (9th Cir. 1905), where the court stated, "[t]he law is well settled that, unless it appears that the appeal, if one had been taken, suspends the judgment in the state where it was rendered, its pendency is no bar to an action in another state on the judgment." The court held that if the defendant had given the requisite security in New York in order to obtain a supersedeas or stay of execution, he would have been entitled to the same stay in an action on the judgment in federal court in Pennsylvania. *Accord*, *General Fin. Corp. v. Penn Nat'l Hardware Mut.*, 17 F.2d 383 (M.D. Pa. 1927). In *Troy City Bank v. Lauman*, 24 F. Cas. 222, 222 (C.C.E.D. Pa. 1857) (No. 14,194), the court held that if "no execution could have been issued on the original judgment . . . [this] would have afforded sufficient ground for a motion to stay proceedings on the judgment here during the pendency of [a] writ of error." See *Union Trust Co. v. Rochester & P.R. Co.*, 29 F. 609 (C.C.W.D. Pa. 1886) ("[A]n action of debt will lie on a judgment of another state, notwithstanding the pendency of an appeal or writ of error."); *Woodbridge & Turner Eng'g Co. v. Ritter*, 70 F. 677 (C.C.E.D. Pa. 1895) (An action on a judgment of a state court will lie notwithstanding the pendency of an appeal); see also cases cited in *Annot.*, 5 A.L.R. 1269 (1920).

ing a bond sufficient to secure payment of the judgment.¹⁵ As one district court judge has stated:

The Revised Statutes of the United States provide for supersedeas, and the manner in which it may be obtained. Otherwise the courts will not ordinarily stay execution or postpone sales pending hearing on appeal.¹⁶

Thus, an action on a federal judgment in another federal court is permitted when the judgment debtor fails to post a supersedeas bond, despite a pending appeal. This is the uniform holding in federal cases involving suits on judgments from state courts.¹⁷

These rulings are sound. When the debtor fails to post a supersedeas bond, the judgment creditor may collect his judgment in any district where the debtor has assets by means of a separate suit on the judgment. In such suits, federal courts have shown little sympathy for debtors who sought to avoid payment by transferring their assets to other districts. The argument that the judgment was not final (and thus not enforceable) because an appeal was pending has fallen on deaf ears. As one federal court paraphrased such a debtor's argument:

The appellant claims that, because an appeal had been taken, the judgment was not a final judgment. . . . He asks us to hold that a judgment creditor, entitled to an execution, may be deprived of the right to maintain an action like this pending an appeal, which may be delayed for years, and with no security for the final payment of the judgment.¹⁸

The court rejected the argument:

We would be loath to follow any case which would sustain such a doctrine, but to the credit of the law no case has been cited which even lends countenance to such contention. . . . The law

15 See, e.g., *Dawson v. Daniel*, 7 F. Cas. 213, 214 (C.C.W.D. Tenn. 1878) (No. 3,668), where the court held that the rule in England and America is the same, which is not to stay proceedings where a suit is brought upon a judgment unless that judgment has been appealed from and a supersedeas has been procured. In *Troy City Bank v. Lauman*, 24 F. Cas. 222, 222 (C.C.E.D. Pa. 1857) (No. 14,194), the court stated, "[i]f the defendant had given the requisite security in New York in order to obtain a supersedeas or stay of execution, he would have been entitled to the same [in Pennsylvania]."

16 *Lesamis v. Greenberg*, 225 F. 449, 453 (9th Cir. 1915), *quoted in* *General Fin. Corp. v. Penn Nat'l Hardware Mut.*, 17 F.2d 383, 385 (M.D. Pa. 1927). Note that FED. R. CIV. P. 62(d) provides for the posting of a supersedeas bond to obtain a stay during appeal. However, FED. R. CIV. P. 73(d), which formerly governed the conditions and amounts of supersedeas bonds, was rescinded in 1968. For the text of former Rule 73(d), see note 6 *supra*.

17 See cases cited in note 14 *supra*.

18 *Jenner v. Murphy*, 6 Cal. App. 434, 92 P. 405 (1907), *quoted in* *General Fin. Corp. v. Penn Nat'l Hardware Mut.*, 17 F.2d at 385.

presumes that a judgment, until reversed, is a correct judicial determination of the rights of the parties.¹⁹

Even after the enactment of Section 1963, an action on a judgment has remained available as an alternate means of enforcing a judgment in another federal district.²⁰ Indeed, four months after the effective date of Section 1963, a district court in Michigan granted summary judgment in an action on a judgment from a district court in New York, despite a pending appeal.²¹ In arriving at its decision to entertain the enforcement action, the court applied the traditional rule. Since the defendant had appealed from the New York judgment without posting a supersedeas bond, the court permitted enforcement in Michigan by an action on a judgment to enforce federal judgments among federal district courts.²²

Thus, registration under Section 1963 and a separate action on a judgment are alternate remedies.²³ A victorious party can choose to enforce his judgment either by registering his judgment in another district or by suing on the judgment. Registration was intended to be the more expeditious procedure.

III. Federal Enforcement of Judgments Under 28 U.S.C. § 1963

Because Section 1963 states that to be registrable a judgment must be "final by appeal or expiration of time for appeal," the statute seemingly provides an automatic stay of registration upon the filing of an appeal as to a judgment debtor's assets outside the jurisdiction. The drafters of Section 1963 apparently did not anticipate the need for registration when a judgment debtor appeals in order to

19 *Id.*

20 The most recent decision to so hold was *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C. Cir. 1983), in which the Court of Appeals for the District of Columbia Circuit reversed a district court dismissal of an enforcement action based on a judgment from the United States District Court for the Southern District of Florida. The trial judge had erroneously concluded that since the judgment from Florida was on appeal, it could not form the basis for a separate enforcement action in the District of Columbia. The lower court decision is a good example of the general confusion that exists concerning enforcement of foreign judgments in federal courts. Other recent cases, although not involving separate enforcement actions, have reaffirmed the availability of an action to enforce a judgment from one federal district court in another district court. *See, e.g.*, *Air Transport Ass'n of America v. Professional Air Traffic Controllers Org. (In re PATCO)*, 699 F.2d 539, 544 (D.C. Cir. 1983). *Accord*, *Urban Indus., Inc. v. Thevis*, 670 F.2d 981, 984-85 (11th Cir. 1982); *Meridian Investing & Dev. Corp. v. Suncoast Highland Corp.*, 628 F.2d 370, 373 n.5 (5th Cir. 1980); *Kaplan v. Hirsch*, 91 F.R.D. 106 (D. Md. 1981).

21 *Slade v. Dickinson*, 82 F. Supp. 416 (W.D. Mich. 1949).

22 *Id.* at 419.

23 *See* cases cited in note 20 *supra*.

obtain time to dispose of his assets. The statutory language contains no provision for registration in such circumstances.

A review of the seven reported cases that have addressed the issue creates the impression that the federal courts have almost uniformly refused registration where an appeal was pending. In all but one of these cases, registration was denied.²⁴ Further, the one reported district court decision construing Section 1963 to allow registration during appeal has now been overruled by implication in a recent opinion by the Court of Appeals for the Eleventh Circuit.²⁵

However, an informal survey of the federal circuits reveals that in a surprising number of unreported decisions courts have allowed registration despite the pendency of an appeal where a judgment debtor sought to avoid payment by transferring his assets to another jurisdiction. Despite the seemingly clear statutory language to the contrary, these courts apparently felt compelled to allow registration during appeal when failure to do so would assist a judgment debtor to avoid paying his creditors.

A. *The Reported Decisions*

In the six reported decisions that have held that registration is unavailable during appeal, none of the courts appeared to have been faced with a debtor who was attempting to avoid payment of a judgment by transferring or otherwise disposing of his assets.²⁶ In contrast, in *Dorey v. Dorey*,²⁷ the one reported case where registration during appeal was allowed, the court faced a judgment debtor who had moved twice to avoid payment.

The first case, and for many years the leading decision on the issue of registration of judgments during appeal, was *Abegglen v. Burnham*,²⁸ decided in 1950. In *Abegglen*, the plaintiff sought to have the

²⁴ The six reported decisions that have directly confronted the issue and have held that registration is not available are *Abegglen v. Burnham*, 94 F. Supp. 484 (D. Utah 1950); *Lipton v. Schmertz*, 68 F.R.D. 249 (S.D.N.Y. 1974); *Goldsmith v. Midwest Energy Co.*, 90 F.R.D. 249 (N.D. Ohio 1980); *Kaplan v. Hirsch*, 91 F.R.D. 106 (D. Md. 1981); *Urban Indus., Inc. v. Thevis*, 670 F.2d 981 (11th Cir. 1982); and *Air Transport Ass'n of America v. Professional Air Traffic Controllers Org. (In re PATCO)*, 699 F.2d 539 (D.C. Cir. 1983). The single reported decision that held that registration is available during appeal where no supersedeas bond is posted is *Dorey v. Dorey*, 77 F.R.D. 721 (N.D. Ala. 1978).

²⁵ *Urban Indus., Inc. v. Thevis*, 670 F.2d at 985. The *Dorey* decision is from the Northern District of Alabama which is now part of the Eleventh Circuit.

²⁶ In *Urban Indus., Inc. v. Thevis*, 670 F.2d 981 (11th Cir. 1982), the debtor tried to escape payment of the judgment against him. By the time the court addressed the registration issue, the dispute was limited to which of two lien holders had priority.

²⁷ 77 F.R.D. 721 (N.D. Ala. 1978).

²⁸ 94 F. Supp. 484 (D. Utah 1950).

district court construe Section 1963 to permit registration of a judgment in a case pending appeal where no supersedeas bond was posted. Instead, the court held:

[T]he phrase final by appeal should be given its ordinary, usual and natural interpretation. The case is still pending until it is disposed of by the appeal and the judgment, in any ordinary sense, cannot be regarded as final until that time.²⁹

The court stated that permitting registration prior to final disposition by appeal would "lead to conflicts and complications between the various districts and circuits" and subject the judgment debtor to the "annoyance" and "oppression" of having to defend himself in every district where the judgment creditor chose to register the judgment.³⁰

Although in 1974 one court followed *Abegglen* in a memorandum opinion,³¹ it was not until 1978 that a reported decision provided any further analysis of the availability of registration during appeal. *Dorey v. Dorey*³² involved a woman who sought to enforce a money judgment from California against her former husband who had since moved to Alabama, in part to avoid having to pay the judgment. By the time Ms. Dorey sued on the California judgment and obtained a new judgment in the federal court in Alabama, her former husband had moved to Texas with all of his assets.

The unscrupulous Mr. Dorey did not post a supersedeas bond to secure the Alabama district court judgment. However, he did file an appeal which, under the literal terms of Section 1963, precluded registration of the judgment in Texas. Ms. Dorey filed a motion in the district court in Alabama for an order directing the clerk of the court to issue a Certification of Judgment for Registration in Another District. The district court granted Ms. Dorey's motion.

The district court held that Section 1963 allows registration of a foreign judgment while an appeal is pending if no supersedeas bond has been filed. The court said that Section 1963 must be read "*in pari materia*" with Rule 62 and Appellate Rule 8, which require the posting of a bond before a stay will be granted.³³ Accordingly, the court ruled that "the statute must be read as assuming an appeal with supersedeas."³⁴ The court reasoned:

29 *Id.* at 486.

30 *Id.*

31 *Lipton v. Schmertz*, 68 F.R.D. 249 (S.D.N.Y. 1974).

32 77 F.R.D. 721 (N.D. Ala. 1978).

33 *Id.* at 723.

34 *Id.*

[T]o allow this defendant to obtain an automatic stay by simply moving across the district line would amount to an injustice of such enormity as to offend the conscience of this court. In the opinion of this court this could not have been the intention of Congress when it enacted Section 1963.³⁵

Unfortunately, instead of limiting itself to a statutory analysis, the court held that a literal application of the "final by appeal" requirement of Section 1963 "would violate the constitutional rights of all judgment creditors."³⁶ Without citing or discussing any cases, the court listed five constitutional provisions which would be violated by the literal application of the "final by appeal" requirement to cases on appeal without a supersedeas.³⁷ None was the least convincing.

The "final by appeal" requirement in the registration statute left the *Dorey* court with a difficult choice. It could either apply the plain meaning of the statute and thereby assist a judgment debtor in avoiding payment of his debts, or it could engage in doubtful statutory interpretation to prevent injustice. The court decided to stretch the statute. Although the court reached a just result, it did so at the expense of the plain meaning of the statutory requirement.

The next reported decision to address the issue after *Dorey* was *Goldsmith v. Midwest Energy Co.*³⁸ The district court in *Goldsmith* provided no substantive discussion of Section 1963 or the "final by appeal" requirement. It failed to cite or discuss *Dorey*, and simply applied the "final by appeal" requirement literally. The court concluded that the registration should be "quashed."

35 *Id.*

36 *Id.*

37 *Id.* at 725. These provisions are:

1. The privileges and immunities clause of the Constitution (art. IV, § 2).
2. The equal protection clause (It would deprive citizens of this distinct equal protection of the laws by giving citizens of other districts a superior right to post-pone payment of their judgment debts.).
3. The due process clause (It deprives the plaintiff of her property without due process of law.).
4. The doctrine of separation of powers (The statute, if interpreted any differently, would constitute a legislative encroachment on judicial power by depriving a final judgment of the United States District Court of its power outside the limited geographical area in which it was obtained.).
5. The full faith and credit clause (Federal courts sitting in diversity and applying state law are entitled to have their judgments accorded the same full faith and credit that the Constitution guarantees for state court judgments because the federal court is, in effect, a substitute for the state court.).

The court also discussed two other nonconstitutionally-based arguments justifying its interpretation of Section 1963.

38 90 F.R.D. 249 (N.D. Ohio 1980).

Not until 1981, in *Kaplan v. Hirsh*,³⁹ was a substantive discussion of *Dorey* reported. *Kaplan* involved a plaintiff who had obtained a judgment in the federal district court in the District of Columbia. Because the defendant had no assets in the District of Columbia, the plaintiff sought to register the judgment in the federal court in Baltimore. The Baltimore court refused to register the judgment because an appeal was pending, and it therefore was not "final by appeal" as required by Section 1963.

The court observed that all the constitutional infirmities identified by the *Dorey* court were "premised on the assumption that a failure to register a foreign district's judgment will prevent extraterritorial execution on the judgment, in effect operating as a stay."⁴⁰ However, the *Kaplan* court noted that this "crucial premise" was "invalid." The court reasoned that even if registration is unavailable because an appeal is pending, the judgment creditor may still enforce his judgment in an independent action. The constitutional problems addressed by the *Dorey* court would arise only if a judgment creditor could not effect extraterritorial execution by any means. Since execution was available via an independent action, Section 1963 does not raise constitutional problems.

The district court in *Kaplan* also believed that Congress' limitation on the availability of Section 1963 was reasonable:

[T]his court finds nothing irrational in the fact that Congress provided a streamlined enforcement procedure for federal judgments, while limiting its application to those judgments which are "final by appeal or expiration of time for appeal."⁴¹

The court observed that such judgments are most suitable for a "streamlined enforcement procedure" because there is "no danger of a later reversal of the original judgment, and collateral attack is quite limited."⁴² The court concluded that the wording of Section 1963 indicates that Congress intended to place just such limitations on the availability of Section 1963.

Like the court in *Abegglen*, the district court in *Kaplan* was not faced with a judgment debtor seeking to dispose of his assets. The equities that compelled the *Dorey* court to allow registration were not present in *Kaplan*. Although the decision in *Kaplan*, like the decision in *Abegglen*, was probably correct, it is still unsatisfying. In theory an

39 91 F.R.D. 106 (D. Md. 1981).

40 *Id.* at 108.

41 *Id.* at 109.

42 *Id.*

independent enforcement action is always available to a victorious plaintiff, but in practice it often is not. *Kaplan* provides an example. When the plaintiff tried to serve process, the defendant could not be found in Maryland.⁴³

The first federal appellate court to address the issue in a full opinion was the Eleventh Circuit in *Urban Industries, Inc. v. Thevis*.⁴⁴ The plaintiff had obtained a judgment in Kentucky and registered it in Atlanta, the site of the defendant's former business operations, in the hope of levying execution upon any of the defendant's property there. The judgment debtor appealed but did not obtain a stay or post a supersedeas bond.

A few months later, the Internal Revenue Service assessed the defendant for unpaid taxes and filed notices of tax liens in various counties in northern Georgia. The issue presented to the court was whether the lien of the judgment creditor or the IRS had priority. The court held that even though the IRS had filed over three months after the judgment creditor, its liens had priority.⁴⁵ It reasoned that the judgment creditor's lien was based on a judgment that was registered during the pendency of an appeal in violation of the requirements of Section 1963. Because the tax liens exceeded the value of the defendant's property, the judgment creditor recovered nothing.

The court's reasoning in *Urban Industries* was substantially the same as that in *Abegglen* and *Kaplan*. The court observed that the requirements of Section 1963 are clear, and it is thus unnecessary to engage in any statutory interpretation:

As we have stated elsewhere, our "starting point in interpreting statutes must be the language of the statutes themselves" [citation and footnotes omitted]. In this case, the language of Section 1963 is unambiguous in requiring that a judgment be final before it may be registered in another judicial district. The statute does not say enforceable judgments, and we see no compelling reason to stretch the plain meaning of the statute by including judgments that may be collectible because no stay was sought or supersedeas bond posted [footnote omitted].⁴⁶

The most recent reported appellate decision on the registration

43 *Kaplan v. Hirsh*, 696 F.2d 1046 (4th Cir. 1982) (2-1 opinion reversing district court and allowing registration) (A subsequent order dated May 27, 1982, withdrew the panel and dissenting opinions, dismissed the appeal as moot, and noted that the panel opinion had already been vacated upon the grant of a petition for rehearing *en banc*. The order dismissing the appeal as moot is unreported.).

44 670 F.2d 981 (11th Cir. 1982).

45 *Id.* at 985.

46 *Id.*

issue is *Air Transport Association of America v. Professional Air Traffic Controllers Organization (In re PATCO)*.⁴⁷ The Air Transport Association of America ("ATA"), a trade association of the nation's major airlines, brought suit in federal court in New York against the Professional Air Traffic Controllers Organization ("PATCO"), the labor union that represented the air traffic controllers formerly employed by the Federal Aviation Administration, to require PATCO to discontinue an illegal strike. The court ordered PATCO to end the strike immediately and to pay ATA \$100,000 for each hour the strike continued.

The strike continued, and after three days ATA obtained three civil contempt judgments against PATCO totalling \$4.5 million. ATA immediately registered the judgments in the District of Columbia where PATCO had most of its assets.⁴⁸ Shortly thereafter, PATCO appealed the contempt judgments without posting a supersedeas bond, moved to vacate the judgments registered in the District of Columbia, and sought to quash the writs of attachment issued pursuant to the registration. The registration issue took on greater significance when PATCO filed for bankruptcy a few months later. If the registration were deemed valid, ATA would be a secured creditor, having established a lien on PATCO's sizeable bank accounts more than 90 days prior to PATCO's filing for bankruptcy.⁴⁹ However, if the lien was invalid because it was based on an improperly registered judgment, then ATA would be merely an unsecured creditor.

The District of Columbia Circuit held that the registration was invalid because the time for appeal had not expired when it was registered. Citing both *Abegglen* and *Urban Industries*, the court held that the words "final by appeal" should be given their "ordinary, usual and natural interpretation."⁵⁰ ATA's judgment from the Eastern District of New York thus did not become registrable until the date

47 699 F.2d 539 (D.C. Cir. 1983).

48 Like the judgment creditors in *Urban Industries* and many similar cases, ATA did not know where PATCO maintained its assets. Counsel for ATA surmised that they were probably in Washington, D.C., where PATCO had its headquarters. Accordingly, counsel for ATA served writs of attachments on every major bank in the District of Columbia hoping to locate and establish a lien on PATCO's assets. In this he was successful, although ultimately it was held that the attachment was not effective. See text accompanying note 51 *infra*.

49 A trustee in bankruptcy may avoid a transfer of a debtor's property made "on or within 90 days before the date of the filing of the [bankruptcy] petition." 11 U.S.C. § 547(b)(4)(A)(1983).

50 699 F.2d at 543.

the Second Circuit affirmed the lower court judgment—which was after PATCO filed for bankruptcy.

Like the Eleventh Circuit in *Urban Industries*, the court in *Air Transport* noted that registration is merely an alternative method of enforcement.⁵¹ Moreover, the court believed that there was a “sensible basis” for withholding registration until a judgment is no longer subject to reversal or modification on appeal:

Since a judge empowered to exercise discretion is not on the scene when a judgment is registered, it appears entirely reasonable to defer the process until the risk of reversal or alteration on appeal has passed. The deferral avoids the complicated unraveling that might become necessary if a judgment, post recognition and enforcement outside the rendering forum, is overturned on direct review.⁵²

Accordingly, the court held that it would give the words “final by appeal” their plain meaning, reserve “rapid-track enforcement” for judgments no longer subject to appeal, and leave to the “traditional mode, the independent action,” enforcement of judgments still open to reversal or modification on appeal.⁵³

Although *Air Transport* and the other reported decisions that apply the literal meaning of Section 1963 may be technically correct, failure to allow registration during appeal often works a substantial injustice upon the judgment creditor. The plaintiffs in *Urban Industries* and *Air Transport* each lost hundreds of thousands of dollars as a result of their inability to register their judgments.⁵⁴ The “final by appeal” language has the effect of giving judicial administration priority over the legitimate interests of plaintiffs who have reduced their claims to judgment.

51 *Id.* at 544.

52 *Id.* at 544-45 (footnotes omitted).

53 *Id.* at 545.

54 The judgment creditor in *Urban Industries* had obtained a judgment of \$681,655 and attempted to establish a lien on \$411,400 in cash and jewelry worth approximately \$1,000,000. However, the IRS lien for unpaid taxes, penalties, and interest against the defendant and his wife was in excess of \$5,000,000. 670 F.2d at 983. Since the tax lien exceeded the amount of available assets, nothing remained by which the judgment creditor could satisfy its judgment.

In *Air Transport*, the three contempt judgments that the judgment creditor sought to register totalled more than \$4.5 million. 699 F.2d at 540-42. Although at the date this article was published the size of PATCO's estate had not been established, estimates advanced by the parties ranged from \$300,000 to \$5.5 million. According to ATA, it had other judgments which, combined with the \$4.5 million contempt judgments, gave it over 90% of the total outstanding creditors' claims against PATCO. If the size of the PATCO estate was closer to the lower estimate, ATA lost tens of thousands of dollars; if it was closer to the higher estimate, ATA lost several hundred thousand dollars.

The threat of a "complicated unravelling" that might become necessary if a judgment is overturned appears to be no greater if a judgment is enforced in a foreign jurisdiction than if enforced in the original jurisdiction. Moreover, the court in *Air Transport* makes an illusory distinction when it says that "a judge empowered to exercise discretion is not on the scene when a judgment is registered."⁵⁵ The actual entry of judgment is a ministerial act by the clerk whether by registration or by court order. And once a judgment is docketed, the enforcement procedure is the same in every federal district.

More importantly, the court in *Air Transport* seems not to distinguish between the mere establishment of a lien through registration and execution upon that lien. Registration simply perfects the lien of the judgment in the district where it is registered. Although "unravelling" a judgment *enforced* in another jurisdiction after it has been reversed may be more complicated, the short answer is that a judgment debtor can avoid the problem by posting a supersedeas bond and obtaining a stay of execution. In appropriate circumstances, he might even get a stay without a supersedeas bond, but then a judge would be on the scene to exercise discretion instead of automatically denying relief to the judgment creditor, as now occurs.

B. *The Unreported Decisions—The Move Away From Literal Application*

The need for a legislative modification of Section 1963 is further highlighted by at least eleven unreported cases in which federal courts ruled that the "final by appeal" requirement should not be applied literally. These cases include decisions by the Courts of Appeals for the Fourth, Fifth, and Ninth Circuits, and several district courts. The three circuit courts and three of the district courts expressly follow *Dorey*.

In *Smyth Transportation Corp. v. United States International Freight Forwarders, Inc.*,⁵⁶ the Washington district court entered a money judgment against an individual defendant and certain companies owned or controlled by him. The defendant applied to the district court for a stay of execution, indicating that he would post a supersedeas bond to secure the judgment during appeal. The district court granted the stay and subsequently granted the defendant two extensions.

When the defendant appealed the judgment but failed to post

⁵⁵ 699 F.2d at 544.

⁵⁶ No. C77-749S (W.D. Wash., Sept. 29, 1981) (subsequently filed in the Eastern District of Virginia with the same caption and number).

bond, the clerk issued certified copies of the judgment. The plaintiff then registered the judgment in the Eastern District of Virginia and initiated execution upon the defendant's assets. The defendant, who had a well-documented history of moving assets to defraud creditors,⁵⁷ filed motions in both the Ninth Circuit and the Eastern District of Virginia to have the registration voided. Citing *Dorey*, both the Ninth Circuit⁵⁸ and the Eastern District of Virginia⁵⁹ refused to vacate the registration or otherwise enjoin the plaintiff from executing upon its judgment in Virginia. However, neither court discussed the Section 1963 cases, nor did they provide any written opinions to accompany their orders.

The Fifth Circuit reached the same result in *The State Exchange Bank v. R.F. Hartline*.⁶⁰ A district court in the Middle District of Florida ordered the clerk to issue a certified copy of the judgment where an appeal was pending but no supersedeas bond had been posted. After considering the parties' arguments, the district court found that *Dorey* was "the better reasoned interpretation" of Section 1963.⁶¹ Thereafter, the defendant filed a motion with the Fifth Circuit requesting that the court stay foreign registration of the judgment, arguing that the pending appeal precluded registration under Section 1963. The Fifth Circuit, without opinion, denied the defendants' motion.⁶²

The Fourth Circuit, in *Kaplan v. Hirsh*, held that the District of Maryland should have allowed registration of a money judgment from the district court in the District of Columbia while an appeal

57 On at least two earlier occasions the defendant had transferred assets in fraud of creditors. See *National Carloading Corp. v. Astro Van Lines*, 593 F.2d 559 (4th Cir. 1979).

58 *Smyth Transp. Corp. v. United States Int'l Freight Forwarders, Inc.*, No. 80-3476 (9th Cir., July 2, 1981) (order denying appellant's motion to enjoin registration in Virginia).

59 *Smyth Transp. Corp. v. United States Int'l Freight Forwarders, Inc.*, No. C77-749S (E.D. Va., May 22, 1981) (order per Albert V. Bryan, Jr., J., denying defendant's motion to vacate registration and quash attachments per reasoning from the bench in which the court based its decision on *Dorey*). Judge Bryan has gone both ways on the issue of the availability of registration of a judgment that is not "final by appeal or the expiration of time for appeal." Faced with a debtor who had a well-documented history of moving assets to avoid creditors in *Smyth Transp. Corp.*, he denied the motion to vacate registration of a judgment that was pending in the Ninth Circuit. However, in *Bank of Lincolnwood v. Federal Leasing, Inc.*, Misc. No. 79-C-2345 (E.D. Va., Sept. 14, 1979), where no exigent circumstances were present, Judge Bryan vacated a judgment from the Northern District of Illinois that had been registered in the Eastern District of Virginia before the expiration of time for appeal.

60 *The State Exch. Bank v. R.F. Hartline*, No. 81-5811 (5th Cir., Sept. 1, 1981) (order denying appellant's motion for stay).

61 *The State Exch. Bank v. R.F. Hartline*, No. 76-650 (M.D. Fla., Aug. 27, 1981) (order requiring clerk to certify judgment).

62 See note 60 *supra*.

was pending before the Court of Appeals for the District of Columbia Circuit.⁶³ Although the panel decision was later withdrawn and the case dismissed as moot,⁶⁴ the opinion buttresses the proposition that registration should be allowed where a judgment debtor appeals without posting a supersedeas bond. The appellate court in *Kaplan* adopted the position in *Dorey* that Section 1963 must be read "*in pari materia*" with Rule 62(d) and Appellate Rule 8, both of which require the posting of a bond to obtain a stay on appeal.

Quoting from *I.T.T. Credit Co. v. Lawco Energy, Inc.*,⁶⁵ the court pointed out the anomaly created when the statute is not viewed *in pari materia* with these two federal rules:

The [Rules] would permit a judgment creditor to levy against assets of his judgment debtor, unless supersedeas bond were posted, while [Section 1963] would prevent the same bond or no bond. . . . There is no sense to be found in such an incongruity, and in light of the policy in federal courts against unsecured stays of execution . . . no justice either.⁶⁶

The Fourth Circuit panel in *Kaplan* also noted that failure to require a bond under Section 1963 could encourage a debtor to elude his creditor by merely "filing an appeal, even on frivolous grounds, and then transferring his assets to another state."⁶⁷ The court concluded that Congress could not have intended to open the way for debtors "to abuse the appellate process in this way."⁶⁸

63 See note 43 *supra*.

64 The Fourth Circuit subsequently vacated the panel opinion upon the grant of a petition for rehearing *en banc* and later withdrew the panel opinions and dismissed the appeal as moot. Nevertheless, the procedural machinations in the case provide a good example of the injustice that can be caused by the "final by appeal" requirement of Section 1963.

After many months of litigation, the plaintiff obtained a judgment against the defendant, and the defendant appealed without posting a supersedeas bond. Since the defendant had no assets in the District of Columbia, the plaintiff sought to execute his judgment in the defendant's home state of Maryland. Although the District Court for the District of Columbia granted plaintiff's motion to certify the judgment for registration, the District Court for the District of Maryland refused to register it. The plaintiff appealed and, after written and oral argument on the issue, won a reversal in the Fourth Circuit. The defendant filed a motion for a rehearing *en banc*, which was granted.

By this time the plaintiff had spent several thousand dollars in legal fees and over a year trying to register his judgment in Maryland. During this period the judgment remained unsecured. Faced with the prospect of having to pay more legal fees and with no guarantee of recovery, the plaintiff decided not to pursue the appeal.

65 86 F.R.D. 708 (S.D. W. Va. 1980).

66 *Id.* at 712 (citations omitted).

67 *Kaplan v. Hirsh*, 696 F.2d 1046, 1048 (4th Cir. 1982).

68 *Id.*

In *American Carpet Mills v. Gunny Corp.*,⁶⁹ the plaintiff obtained a judgment against the defendant in the Southern District of Georgia. The defendant appealed but did not post a supersedeas bond. Since the defendant had no assets in Georgia, the plaintiff sought a court order to authorize the clerk to issue a certified copy of the judgment to register in other jurisdictions.

Despite the pending appeal, the court granted plaintiff's motion. Citing *Dorey*, the court stated:

To permit the defendant to pursue appeal without [posting a supersedeas bond] "would allow the perpetration of fraud not only upon the judgment creditor but upon this court as well. . . ." Moreover, it seems entirely appropriate to read § 1963 in light of the requirements of [Rule 62]. By declining plaintiff's motion for certification, this court would only leave open the opportunity for abuse. . . .⁷⁰

In eight other unreported decisions, district courts have held that judgments may be registered pursuant to Section 1963 despite a pending appeal if no stay has been obtained by court order or by posting a supersedeas bond. These cases arose in district courts across the nation, including Texas,⁷¹ Maryland,⁷² New York,⁷³ Pennsylvania,⁷⁴ Oklahoma,⁷⁵ and the District of Columbia.⁷⁶

69 No. CV4790168 (S.D. Ga., Sept. 12, 1980) (order directing clerk to issue certified copy of judgment despite pending appeal).

70 *Id.*

71 *Linton & Co., Inc. v. Robert L. Reid Eng'r, Inc.*, Misc. Action No. 81-33 (S.D. Tex., Mar. 23, 1981) (order directing clerk to register judgment from Middle District of Alabama which was still on appeal) (registrant's brief relies on *Dorey*); *Electronic Data Sys. Corp., Iran v. Social Sec. Org. of Gov't of Iran*, No. 3-79-218F (N.D. Tex., May 9, 1980) (order directing clerk to issue certified copy of judgment).

72 *Beebe v. Auslander*, Bankruptcy No. 75-00954 (D. Md., Mar. 7, 1980) (order directing clerk to issue certified copy of judgment despite pendency of an appeal); *Square Constr. Co. v. Washington Metropolitan Area Transit Auth.*, Misc. No. 1313 (D. Md., Dec. 28, 1979) (order directing clerk to register judgment from Eastern District of Virginia that was still on appeal) (registrant's brief relies on *Dorey*); *Zukowski v. Dunton*, Misc. No. 1349 (D. Md., Apr. 9, 1980) (order directing clerk to register judgment from Eastern District of Virginia that was still on appeal).

73 *Kirno Hill Corp. v. Holt*, No. 76-403 (S.D.N.Y., Oct. 26, 1979) (order per Weinfeld, J., directing clerk to issue certified copy of judgment notwithstanding pendency of an appeal).

74 *Kirno Hill Corp. v. Holt*, Misc. No. 79-702 (E.D. Pa., Dec. 14, 1979) (order denying defendant's motion to quash writ of execution).

75 *CCMS Publishing Co. v. Dolley-Maloof, Inc.*, Civil Action No. 78-01030-E (W.D. Okla., Oct. 15, 1979) (order directing clerk to issue certified copy of judgment despite pending appeal) (judgment subsequently filed in Middle District of Florida and Eastern District of Virginia).

76 *Kaplan v. Hirsh*, CA No. 80-2898 (D.D.C., June 23, 1981) (order directing clerk to issue certified copy of judgment despite pending appeal).

IV. Anomalies Created By the Double Standard For Enforcing Foreign Judgments

Applying different standards for enforcing federal judgments creates several anomalies. First, a judgment debtor can obtain a stay of execution pending appeal on assets located in the state where the federal judgment is rendered only by posting a supersedeas bond. But as to assets in other jurisdictions, a judgment debtor can obtain a stay of execution when the judgment creditor proceeds via Section 1963 by merely filing a notice of appeal without a supersedeas bond. By prohibiting registration during appeal, Section 1963 prevents even the perfection of a lien on a debtor's assets located in other jurisdictions.

Second, when a judgment debtor fails to post a supersedeas bond, a judgment creditor is entitled to bring an enforcement action on his judgment in other federal courts even if an appeal is pending on the original judgment. But the judgment creditor is not entitled even to register his judgment in other districts. If the creditor obtains a new judgment on his original judgment, he can execute on the new judgment but still cannot register the original one. This is especially ironic since the registration statute was intended to expedite enforcement of federal judgments in foreign districts.

Third, in the twenty-one states that have enacted the Uniform Enforcement of Foreign Judgments Act,⁷⁷ it is easier to enforce a federal judgment through a state court than through a federal court. Under the Uniform Act, the judgment creditor can "file" his federal judgment in any state court without regard to whether an appeal of the original judgment is contemplated or pending.⁷⁸ In this way, the judgment creditor can perfect his lien with respect to out-of-state property and so protect against liens subsequently filed in that state.

77 UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 173 (1964) [hereinafter cited as UNIFORM ACT]. The states that have adopted the UNIFORM ACT to date are Alaska, Arizona, Colorado, Connecticut, Idaho, Iowa, Kansas, Maine, Minnesota, Nevada, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming.

78 This is based on § 2 of the UNIFORM ACT which provides:

A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the Clerk of any [District Court of any city or county] of this state. The Clerk shall treat the foreign judgment in the same manner as a judgment of the [District Court of any city or county] of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a [District Court of any city or county] of this state and may be enforced or satisfied in like manner.

The judgment debtor can obtain a stay of execution of the filed judgment pending appeal, but only “upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.”⁷⁹ In practice, execution on the filed judgment will be stayed only on posting of a superseas bond.

The two state courts that have addressed the issue both held that the Uniform Act requires enforcement of judgments still on appeal if they are enforceable in the state that rendered them.⁸⁰ It seems clear that the federal registration statute should conform to the Uniform Act applicable in state courts.

V. The Need for Revision of 28 U.S.C. § 1963

Section 1963 should be amended to delete the “final by appeal” language and permit registration of a judgment even though it is pending on appeal whenever no superseas bond has been posted. This would make the statute consistent with the alternative procedures for enforcement, namely, an independent suit on the judgment and the Uniform Enforcement of Foreign Judgments Act. This would also make the statute consistent with enforcement requirements in the district where the judgment was originally entered.

Allowing registration during appeal would also reduce the incentive for an unprincipled judgment debtor to file an appeal and transfer his assets to another district to protect them from execution. There is surely no reason to provide this escape for unprincipled debtors to avoid payment of a judgment. By allowing registration, the judgment creditor would be able to perfect his lien in a foreign district and thereby protect himself against subsequently-filed liens in that district.

⁷⁹ Section 4(a) of the UNIFORM ACT provides:

If the judgment debtor shows the [District Court of any city or county] that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires or the stay of execution expires, or is vacated, *upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.* (emphasis added).

⁸⁰ See *Jones v. Roach*, 118 Ariz. 146, 575 P.2d 345 (1977); *Everson v. Everson*, 264 Pa. Super, 563, 400 A.2d 887 (1979), *modified*, 494 Pa. 348, 431 A.2d 889 (1981); see also *Fehr v. McHugh*, 413 A.2d 1285, 1287 (D.C. 1980) (“Given the fact that the money judgment is final under Colorado law, we hold that the mere existence of a pending appeal does not deprive the order of the requisite degree of finality entitling it to recognition under the Full Faith and Credit Clause of the Constitution.”).

At the same time, the statute should provide reasonable protection for the judgment debtor. Although registration should be allowed immediately upon entry of judgment, it should not be enforceable until ten days thereafter. This would make enforcement of the registered judgment consistent with enforcement of the judgment in the rendering state under Rule 62(a). Finally, there should be a procedure for notifying the judgment debtor of the foreign district registration. Then, if the judgment creditor obtains a stay of execution in the court where the judgment was entered, he may effect a stay in any court where the judgment is registered by filing a certified copy of the stay.

The following language would accomplish these goals:

1. A judgment in an action for the recovery of money or property now or hereafter entered in any district court may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.
2. For purposes of this section a judgment shall be deemed to be final and registrable immediately upon its issuance and notwithstanding that an appeal may be pending, or that the time for appeal has not expired. Upon the request of any party, the clerk of the court of the district in which the original judgment was entered shall issue certified copies of the judgment in form and content suitable for registration or filing in any other court. A judgment so registered shall be enforceable upon the expiration of ten days from the date of entry of the original judgment.
3. When registering a judgment, the judgment creditor or his lawyer shall make and file with the clerk of the court where the judgment is registered an affidavit setting forth the name and last known post office address of the judgment debtor, and the address of the judgment creditor.
4. Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.
5. A stay of execution of the original judgment shall operate as a stay as to any registered judgment upon the filing of a certified

copy of the stay order in the court where the judgment is registered.

The first paragraph is a restatement of the first paragraph of Section 1963 but with the phrase "final by appeal or expiration of time for appeal" omitted. The second paragraph is based in part on language from the English Foreign Judgments (Reciprocal Enforcement) Act of 1933⁸¹ which allows registration "notwithstanding that an appeal may be pending against it or that it may still be subject to appeal."⁸² The last two sentences of the second paragraph would allow the prevailing party to sue upon or docket the judgment in any national, state, or local court in the United States or another country. He could thus establish a lien on the judgment debtor's property wherever such property may be located. Consistent with Rule 62(a),⁸³ the registered judgment would be subject to an automatic ten-day stay of execution. The automatic ten-day stay would run,

81 The Foreign Judgments (Reciprocal Enforcement) Act of 1933, reported in 6 HALSBURY'S STATUTES OF ENGLAND, *Conflicts of Laws* § 1(3), at 366 (1969).

82 Section 1(3) of the Foreign Judgments (Reciprocal Enforcement) Act of 1933 states: "For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court." Section 11(1) of the Act defines "appeal" to include "any proceeding by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution."

Some ambiguity exists as to whether registration and enforcement may be had in England where a stay of execution is in effect in the country where the original judgment was rendered. The common law rule was that where a stay was in effect an enforcement action would not lie in England. *Scott v. Pilkington* (1862) 2 B&S 11; *Beatty v. Beatty* [1924] 1 KB 807, 815, C.A. See *Dawson v. Daniel*, 7 F. Cas. 213 (C.C.W.D. Tenn. 1878) (No. 3,668), for a discussion of the English common law rule and the case cited therein.

A literal reading of the Foreign Judgments (Reciprocal Enforcement) Act of 1933 seems to indicate that the common law rule was changed to allow registration and enforcement even if the original judgment is stayed. Section 1(3) indicates that a judgment is to be final and conclusive even though an *appeal* may be pending, or the judgment is appealable, in the courts of the country of the original court. Since § 11 of the Act defines "appeal" to include a "stay of execution," one might conclude that a judgment creditor could obtain enforcement in England despite a stay of execution in the original court.

However, two reported decisions that have addressed the issue have held that in the normal case, where a general stay of execution is granted pending an appeal, the judgment is not regarded as final and conclusive for purposes of enforcement in another jurisdiction. *Colt Indus., Inc. v. Sarlie*, (No. 2) [1966] 1 WLR 1287, 1293, 3 All ER 85, C.A.; *Berliner Industriebank AG v. Jost* [1971] 2 QB 463, 471-72, [1971] 2 All ER 1513, 1518, C.A. The apparent discrepancy may be explained by § 5 of the Act which permits the registering court, in its discretion, to set aside the registration or adjourn the application to set aside the registration pending the outcome of the appeal on the original judgment. See also *Colt Indus., Inc. v. Sarlie*, (No. 2) [1966] 1 WLR 1287, 1293, 2 All ER 85, C.A.; 8 HALSBURY'S LAWS OF ENGLAND, *Conflicts of Laws* § 734 (1969) (cases cited). Another explanation simply may be poor drafting.

83 FED. R. CIV. P. 62(a), provides: "Except as stated herein, no execution shall issue

however, from the date of entry of the *original* judgment. Thus judgment creditors would not be hampered by an additional automatic stay running from the date of registration.

The third and fourth paragraphs are a slight modification of similar language contained in the Uniform Enforcement of Foreign Judgments Act.⁸⁴ They provide three safeguards to insure that the judgment debtor receives notice of the registration. First, they require the judgment creditor or his attorney to apprise the court under oath of the last known postal address of the debtor and creditor. Second, they require the clerk of the court where the judgment is registered to give the judgment debtor notice of the registration. Third, they give the judgment creditor an incentive to provide the judgment debtor a second notice. They do so by eliminating any challenge to enforcement based on the clerk's failure to notify the debtor if the judgment creditor files a separate proof of mailing. These notice requirements would allow a judgment debtor an opportunity to challenge a registered judgment on the same limited grounds that he might challenge the judgment entered against him in the original jurisdiction, namely, lack of subject matter or personal jurisdiction, or fraud.

The final paragraph, based on Section 4 of the Uniform Enforcement of Foreign Judgments Act,⁸⁵ enables a judgment debtor who has posted a supersedeas bond to stay enforcement of the registered judgment. Here a distinction is drawn between mere registration of a judgment in another district and subsequent "post-registration" enforcement proceedings such as garnishment and sale. Registration should be available to a judgment creditor as a matter of right immediately upon the entry of judgment. However, where a judgment debtor has appealed and posted a supersedeas bond to secure the judgment creditor, he should be permitted to stay further enforcement in other districts by filing a certified copy of the stay order with the registering court.⁸⁶ Once notified of the registered judgment, the judgment debtor has the burden of filing a certified

upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry."

84 See UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT §§ 2, 3, 13 U.L.A. 177 (1964).

85 See note 79 *supra* for text of § 4 of the UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT.

86 Report of the Proceedings of the Judicial Conference of the United States 13 (Mar. 5-6, 1980). For the report that recommended deleting the "final by appeal" requirement of Section 1963, see Judicial Conference of the United States, Committee on Court Administration, Report on the Meeting of the Subcommittee on Federal Jurisdiction (Jan. 7-8, 1980).

copy of the stay order wherever the judgment is registered to perfect the stay in such districts.

VI. Conclusion

Section 1963 was enacted to expedite enforcement of federal judgments throughout the United States and to avoid the delays and difficulties attendant on a suit on a judgment. However, when quick enforcement in another district is needed most—when a judgment debtor is determined to avoid payment by appealing without posting a supersedeas bond—the present registration statute is useless. In these circumstances, a creditor must resort to the slow, expensive, and therefore ineffective enforcement method of bringing an action on the judgment. To protect victorious parties, Section 1963 should be amended to delete the “final by appeal” requirement.