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STATE APPEAL BOND REFORMS PROTECT DEFENDANTS' DUE PROCESS RIGHTS

by

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Over the past several years, defendants in civil litigation have pursued reform of state laws and rules which require them to post a bond prior to appealing an adverse judgment. Reform proponents have not taken issue with the requirement. Rather, they have sought reasonable reductions in the amount of the bond which, considering the skyrocketing damage awards that have now become commonplace, threaten their fundamental right to appeal. This LEGAL BACKGROUNDER will examine the appeal bond requirement, the factors which have contributed to the push for reform, the types of changes that have been adopted, and what additional steps may be taken to protect defendants' rights.

“Supersedeas” Bonds. In all but five states,¹ defendants wishing to appeal adverse verdicts must post a “supersedeas” bond with the presiding trial court. Such bonds protect plaintiffs by guaranteeing that a civil defendant will have assets sufficient to satisfy the judgment if appeal efforts ultimately fail. Some jurisdictions have allowed the trial judge to set the amount of the bond. Laws in other states required that presiding judges impose a bond of at least 100% of the judgment, plus fees, interest, and costs. Many of those laws also denied judges the discretion to reduce or waive the bond. Notably, states have never imposed any similar financial responsibilities on plaintiffs who wish to appeal verdicts.

Impact of the New Litigation Environment. States adopted such bonding requirements many years ago, when most civil litigation involved individuals, not well-established businesses employing hundreds or thousands of workers, and at a time when multi-million or billion dollar verdicts were unthinkable. The civil litigation environment has changed dramatically since those requirements took effect. Plaintiffs' lawyers today pursue litigation with the approach and savvy of business entrepreneurs², and their attempts to expand tort liability theories have found favor with many judges. Widespread acceptance and application of mass tort and class action approaches to litigation, as well as new working relationships between private lawyers and state- and local-government officials, have contributed heavily to the legal system's drift from its original purposes. *See, James M. Wootton, How We Lost Our Way: The Road To Civil Justice Reform, WORKING PAPER No. 120 (Wash. Lgl. Fndt.),*

¹Connecticut, Maine, Massachusetts, New Hampshire, and Vermont automatically stay a judgment upon notice of an appeal.

²*See, e.g., Barnaby J. Feder, Lawyers Organizing for Mass Suits Over Vioxx, N.Y. TIMES, Nov. 5, 2004, at C1.*

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available at <http://www.wlf.org/upload/finalwootton.pdf>; Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Tort Reform Past, Present And Future: Solving Old Problems And Dealing With 'New Style' Litigation*, 27 WM. MITCHELL L. REV. 237, 261 (2000). The amount of jury verdicts has concurrently increased. In 1992, there were eight verdicts exceeding \$100 million; in 2003, there were twenty-one. See *VerdictSearch Top 100 of 2003*, at http://www.verdictsearch.com/jv3_news/top100/; *1992's Largest Verdicts*, NAT'L LAW J. at S1 (Jan. 25, 1993).

With the rise in verdicts and lawsuit opportunities, the prevailing bonding requirements soon became a significant factor in the dynamics of civil litigation. Defendants subject to such verdicts invariably appeal them, a right protected by law in most jurisdictions. Their ability to do so could be chilled, or made impossible, by the need to post a bond equal to the amount of an exorbitant damage award. A defendant then may have faced the Hobson's choice of posting a bond which could bankrupt the company or settling the claim despite having excellent grounds for appeal. In 1987, for instance, Texaco Inc. lost an \$11.2 billion verdict in a suit by Pennzoil Inc., and when it was unable to post an appeal bond, declared Chapter 11 bankruptcy.

The appeal bond requirement, and the accompanying risk of bankruptcy, can be a powerful hammer in the hands of plaintiffs' lawyers when they are trying to persuade their litigation quarry to submit and settle. In 1995, a Mississippi jury imposed a stunning \$500 million award on a Canadian company which was embroiled in an insurance dispute with a local company. The bond requirement was \$625 million, the net worth of the company. To avoid bankruptcy, the company settled for \$175 million rather than appeal. See *O'Keefe v. The Lowen Group*, No. 91-67-423 (Circ. Ct., Hinds Co., Miss. 1995). Full judgment bonding requirements also most likely played a significant role in the \$246 billion "Master Settlement Agreement" reached between state attorneys general and tobacco companies in 1998. The risk of having to file bankrupting appeals bonds if they lost in court factored into the companies' decisions not to test the state lawsuits' highly novel legal theories in court. These novel theories, and the plaintiffs' lawyer-government alliance that invented them, were soon to be unleashed against other unpopular defendants, such as gun makers and lead-based paint producers, raising the specter that more businesses might face the unenviable choice between posting bankrupting bonds or settling suspect claims.

Fundamental Due Process and Fairness Denied. Defendants should be on the same footing as plaintiffs when it comes to their ability to appeal an adverse verdict. But as has been discussed above, appeal bond requirements can act as a full denial of this right of appellate judicial review. The U.S. Supreme Court has held that a state violates the Due Process Clause if it imposes procedures which effectively impede access to the appellate court system. *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985); *Smith v. Robbins*, 528 U.S. 259, 270 (2000). It has also held that defendants facing punitive damages have a due process right to an appeal. *Honda v. Oberg*, 512 U.S. 415, 432 (1994). In the case involving Texaco and Pennzoil, the U.S. Court of Appeals for the Second Circuit determined that bankrupting appeals bonds could deny due process. It recognized that imposing a \$12 billion bond would cause irreparable harm and "rapidly produce a catastrophe of major proportions, causing substantial harm to Texaco itself and to thousands of others throughout the United States, including stockholders, customers, and suppliers." *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1152 (2d Cir. 1986) *overruled on procedural grounds*, 481 U.S. 1 (1987).

So basic are the due process rights at stake in appeal bond situations that several newspapers normally unsympathetic to victims of lawsuit abuse editorialized on the issue after one particularly egregious situation arose in Illinois. After imposing a \$12 billion judgment on Philip Morris, Judge Nicholas Byron, seated in the notorious Madison County jurisdiction, required the company to post a potentially bankrupting \$12 billion bond. *The New York Times* wrote that the ruling is the type that “erodes the credibility of our legal system,” and that the bankrupting effect of it “renders the right to an appeal meaningless, and thus violates the defendant’s due process rights.” *Too Costly an Appeal*, N.Y. TIMES, Apr. 4, 2003 at A20. The *Chicago Tribune* wrote that the “Illinois Supreme Court should substantially reduce the bond and revisit its own rules for appeal.” *A Madison County Jackpot*, CHICAGO TRIB., Apr. 2, 2003 at 22. Also, when it amended the rules for bonds in reaction to this uproar, the Illinois Supreme Court acknowledged in commentary, “the appeal bond requirement may be so onerous that it creates an artificial barrier to appeal, forcing a party to settle a case or declare bankruptcy.” *Amended Rule 305*, Commentary, paragraph (a).

Onerous bonding requirements, in addition to being constitutionally suspect, can rob defendants and society of essential checks and balances on the excesses of the legal system. When it becomes clear that a defendant will be unable to post a bond equal to the extreme damages being sought, the lawyers suing those companies have one more incentive to present exotic legal theories, utilize prejudicial and inflammatory evidence, and pursue arguments, all of which would likely lead to reversal of any judgment on appeal.

One case supporting this point is *Liggett Group v. Engle*, a massive class action lawsuit in Florida against tobacco companies, in which the judge endorsed unprecedented legal theories and permitted the plaintiffs’ lawyer to use outrageously prejudicial rhetoric in front of the jury. See, e.g., Professor Michael I. Krauss, *Liggett Group v. Engle: A Case Study In Class Action Abuse*, 18 LGL. BACKGROUNDER 48 (Wash. Lgl. Fndt.). The trial resulted in a \$145 billion award, and a \$181 billion appeal bond demand. To preserve the defendants’ rights, the Florida legislature passed a law to cap the required bond, and the companies were permitted to appeal. The appeals court strongly rebuked the trial judge’s rulings and management of the case, and reversed the verdict. *Liggett Group Inc. v. Engle*, 853 So.2d 434 (Fla. Dist. Ct. App. 2003) (the case is now on appeal before the Florida Supreme Court).

Reform Results. Following Florida’s lead, thirty other states have in the past several years adopted reforms of supersedeas bond requirements, either through legislation³ or by altering court rules.⁴ A majority of the laws impose a specific cap on the amount of the bond, ranging from \$25 million to \$150 million. Some laws require the lesser of several options. Nebraska’s law, for instance, mandates that the amount be the lesser of the money judgment, 50% of the appellant’s net worth, or \$50 million. Some apply to all judgments in civil litigation regardless of the legal theory. Others, such as the laws of Idaho and Kentucky, apply only to the punitive damage portion of a judgment. The majority of the laws apply to all civil litigants, though some apply only to those tobacco companies who signed the Master Settlement Agreement, and their successors and affiliates.

³Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.

⁴Illinois, Mississippi, and South Dakota.

Mississippi's and South Dakota's court rule amendments apply to all litigants and both impose hard caps on the bonds (though Mississippi's is the lesser of 125% of the judgment, 10% of appellant's net worth, or \$100 million). Mississippi's rule only applies to the punitive damage portion of an award, while South Dakota's applies to all money judgments. Illinois' rule change, rather than setting a specific limit on all civil litigants' appeal bonds, grants trial judges clearer discretion in setting an amount if the judge determines that an amount equal to the judgment plus costs and interest is "beyond the means of the judgment debtor." Business defendants pursued a specific bond cap law in Illinois, but the legislature failed to take action. Illinois' approach is troublesome because the state's courts are still permitted to set an appeal bond at an amount which could potentially bankrupt a defendant, fails to alleviate uncertainty that litigants face, and could lead to protracted and burdensome post-trial proceedings.

An Abuse of the Process? Those in the plaintiffs' bar and the special interest activist community who oppose bonding reform argue that the changes sought permit defendants to game the appeals system and limit culpable businesses' liability. By labeling these changes "the quiet 'tort reform,'" media stories have tried to advance the faulty impression that they affect substantive rights. David Hechler, *Appeal Bond Caps: the Quiet Tort Reform*, NAT'L LAW J., Feb. 16, 2004, at 1. Appeal bond reforms do not impair a plaintiff's right to file suit. They also in no way change the substantive law applied in state civil litigation. But the amount of the bond, whether it is at or below the total damage award, has no effect on the judgment itself. If the verdict is upheld on appeal, the defendant is required to pay the full amount of the judgment.

In addition, virtually all of the laws or court rules protect plaintiffs by providing procedural safeguards against the diversion or sale of corporate resources. Defendants are prohibited from dissipating or moving large sums of money when they are undergoing an appeals process. In those instances where it is proven to be occurring, the judge can require a much larger bond, up to the amount of the judgment.

Conclusion. Supersedeas bond requirements serve the essential purpose of protecting a plaintiff's access to damages awarded in a trial. However, the requirements as originally adopted in most states — compelling the posting of a bond equal to the judgment — are now outdated in light of the new, exceptionally hostile litigation environment that defendants face. Unreasonable bond requirements, when applied in such a manner that they force defendants to choose between appeal and bankruptcy, also tread upon constitutional due process rights. Thirty-one states have recognized the harm which full-judgment bonds impose on business defendants, as well as their impact on employees, shareholders, and pensioners, and have wisely acted to bring reason to their bonding laws.

Reform proponents continue their admirable work, seeking changes in the remaining states that have not altered their appeal bond requirements. Legislatures or courts that refuse to take action run the risk of making their legal systems more attractive to entrepreneurial lawyers, a reputation that would seriously burden their states in today's fierce nationwide competition to attract job-creating businesses. Those states which have implemented bonding reform only for certain legal theories or litigation targets might also consider extending their laws to all parties and theories, as North Carolina and Oklahoma have recently done. Further changes such as these would help insure that regardless of where they are sued, no defendant would have their right to appeal impaired by the threat of a bankrupting bond.