

Analysis & Perspective

In the new era of civil litigation and class action lawsuits, society is witnessing unprecedented judgments. Defendants attempting to challenge such judgments should have full access to a state's appellate court system. Indeed, appeal to at least one appellate court typically is a protected right in most states. Unfortunately, outdated appeal bond rules in many states present serious obstacles that uniquely and disparately bar losing defendants from exercising their fundamental right to appeal.

In this article, the authors, Mark A. Behrens and Donald J. Kochan, describe the potentially devastating economic effects of current appeal bond statutes. They argue that fundamental due process and equal protection principles mandate bonding reform, and conclude that the model legislation crafted by the American Legislative Exchange Council (ALEC), provides a good starting point for state legislatures.

Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness

By MARK A. BEHRENS AND DONALD J. KOCHAN

Supersedeas ("appeal") bonds provide security that a civil defendant who suffers an adverse judgment at trial will have assets sufficient to satisfy the judgment if efforts to challenge the verdict on appeal prove to be unsuccessful. For example, the Kansas and Texas appeal bond statutes require a civil defendant desiring to appeal an adverse judgment to post a bond equal to 100 percent of the judgment, plus costs and interest.¹ Thus, a defendant facing a \$5 million judgment would have to post a bond of over \$5 million (judgment plus costs and interest) in order to be able to prevent the plaintiff from seizing its assets while it appeals.

The bonding requirements in some states are much higher. For example, Mississippi generally requires a defendant to post an appeal bond equal to 125 percent

¹ See Kan. St. Ann. § 602103 (d) (1999); Texas R. App. Pro. 24.2(a)(1) (2000).

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of any money judgment against it.² Still other states, such as Louisiana, allow courts to set the bond as high as 150 percent of the judgment.³

In this day of increasingly massive verdicts, these types of bonding requirements could force a defendant into bankruptcy before it can have its day in an appellate court. This obviously has terrible implications for the defendant, its workers and shareholders, and for the health of the economy in general. Oppressive bonding requirements also raise serious questions about the fairness of the civil justice system, as well as constitutional due process concerns. In this climate, states should give serious attention to bonding fairness reform. A good place for legislatures to start is the model legislation crafted by the American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership association of state legislators, numbering over 3,000.

New Litigation Raises Bonding Fairness Problems

The laws in many states are outdated and in need of reform. Most bonding statutes were adopted when judgments were generally more reasonable in scale—before the creation of novel and expansive theories of

² See Ms. R. App. Pro. 8 (2001). An April 26, 2001, amendment to Rule 8 limits the bond on the punitive damages portion of a judgment to the lower of 125 percent of the total amount of punitive damages or 10 percent of the defendant's net worth. The new rule also states that, absent unusual circumstances, the total amount of any bond for punitive damages may not exceed \$100 million.

³ See La. Code Civ. Pro. Art. 2124(C) (2000).

liability, and before the rapid rise of class actions and mass torts,⁴ and the emergence of state- and local-government sponsored lawsuits that aim to reach deep into the pockets of corporate defendants.⁵ These "new style" lawsuits have created the possibility of astronomically large judgments in civil cases. Bonding statutes can stand as an unfair roadblock to appeals of such crushing verdicts.

The problem of oppressive appeal bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. As one law professor has observed, "If multi-billion dollar judgments had been entered against the tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy."⁶ Bonding requirements were a driving force behind the massive \$246 billion settlement.

The bonding issue came up again in July 2000, when a Miami jury awarded a record-setting \$145 billion in punitive damages in a 700,000-member class action against the tobacco industry,⁷ despite the fact that virtually all federal and state courts in similar cases had rejected the trial court's approach.⁸ Most observers believe that the case will ultimately be overturned on appeal, but the defendants almost lost that fundamental right. Some in the industry may not have been able to post an appeal bond on such an enormous verdict; those companies would have been forced into bankruptcy—and the roughly \$13 billion a year tap of money that is supposed to flow forever to the states under the Master Settlement Agreement would have been turned off.⁹ This problem was avoided when the Florida Legislature stepped in and reformed Florida's bonding statute in order to allow the defendants the opportunity to appeal the unprecedented judgment.¹⁰

Tobacco Not Unique. Bonding problems, however, are not "just a tobacco issue." The new trends in litigation put at risk many other corporations and industries that will face bars to appeal by current state bonding rules. No crystal ball is needed to make this prediction. One

⁴ From 1988 to 1998, class action filings against Fortune 500 companies increased by more than 1,000 percent in state courts and 338 percent in federal courts. See Federalist Society, *Analysis: Class Action Litigation—A Federalist Society Survey*, 1 *Class Action Watch* 1, 5 (1999).

⁵ See William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 *Tul. L. Rev.* 1885 (2000); 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).

⁶ Richard L. Cupp, *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 *Pepp. L. Rev.* 685, 689-90 (2000).

⁷ See *Engle v. R.J. Reynolds Tobacco Co.*, No. 9408273 (Cir. Ct., Dade Cty., Fla. 2000).

⁸ See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

⁹ See Holman W. Jenkins, Jr., *Look Who's Falling in Love With Tort Reform*, *Wall St. J.*, Apr. 26, 2000, at A27.

¹⁰ See *Fl. St. Ann.* § 768.733 (2000) (bond for punitive damages portion of class action judgment may not exceed \$100 million or 10 percent of defendant's net worth, whichever is less).

only needs to look at what is happening across the nation in the wake of the state attorneys general tobacco litigation.

Despite the claims of most attorneys general that tobacco was a "unique" situation, and that no lawsuits would be brought against other industries, local governments already have hired private attorneys to sue gun manufacturers in a large number of cities.¹¹ Rhode Island retained a well-known plaintiffs' firm to assist in an effort to hold former manufacturers of lead paint liable for government health-care costs.¹² Other states are reportedly considering similar actions.¹³ Several local governments have filed or plan to file their own lawsuits.¹⁴

The list may not stop there. Part of the 1998 tobacco Master Settlement Agreement included a payment of \$50 million into an enforcement fund to be used by the National Association of Attorneys General.¹⁵ Although this payment might not be used to fund litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June 1999, fifty state attorneys general held a strategy session to discuss future targets.¹⁶ Reports suggest that these targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries.¹⁷

Entrepreneurial Spirit. The entrepreneurial spirit of some government officials and their new ally, the contingency fee personal injury bar, is probably best illustrated by an Aug. 27, 1999, letter from Rhode Island Attorney General Sheldon Whitehouse to his colleagues

¹¹ See Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 *Harv. J. On Legis.* 515 (2000).

¹² See Victor E. Schwartz, *Trial Lawyers Unleashed*, *Wash. Post*, May 10, 2000, at A29.

¹³ See Robert A. Levy, *Turning Lead Into Gold*, *Legal Times*, Aug. 23, 1999, at 21.

¹⁴ See Scott Winokur, S.D., *Oakland Join Suit Over Lead Paint/Redress Sought for Health Costs*, *S.F. Chron.*, Jan. 22, 2001, at B1 (San Francisco and Oakland joining suit brought by Santa Clara County); Greg Borowski, *Council OKs Lead Paint Lawsuit*, *Milwaukee J. Sentinel*, Oct. 20, 2000, at B1 (Milwaukee); Norm Parish, *City's Lead Paint Suit Is Almost Identical to One in Rhode Island; Team Handling That Case Was Rejected Here; Harmon Selected More Costly Firm*, *St. Louis Post-Dispatch*, Feb. 24, 2000, at B1 (reporting that St. Louis complaint was nearly a duplicate of one filed by a legal team that the city rejected to handle the case; the work was given to a more expensive and less experienced attorney who contributed to the Mayor's campaign fund). See also Editorial, *It's All About Money*, *St. Louis Post-Dispatch*, Feb. 22, 2000, at B12; Bill Murphy, *2 School Districts Sue Paint Makers/Houston, Spring Branch Seek Money to Treat Lead and Eliminate Hazards*, *Houston Chron.*, July 7, 2000, at 21.

¹⁵ See Samuel Goldreich, *Small Farmers Stand Against Big Tobacco's Settlement; \$246 Billion Deal Burns Independent Growers*, *Wash. Times*, Apr. 26, 1999, at D11.

¹⁶ See Mark Curriden, *Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive*, *Dallas Morning News*, July 10, 1999, at 1A.

¹⁷ See Jim McLean, *Lawyers: States Abusing Litigation, Topeka Cap.-J.*, Mar. 8, 2000; Roger Myers, *Lawmaker Plugs Competitive Bids*, *Topeka Cap.-J.*, Mar. 7, 2000, at 5A.

across the country.¹⁸ Whitehouse's correspondence started as follows: "This is in the nature of a 'brainstorming' letter."¹⁹ Apparently, he was sitting in his office thinking of potential new targets for coordinated lawsuits. He then went on to suggest "[g]oing after the latex rubber industry."²⁰ What for? To "put a couple of billion dollars into a foundation to raise awareness and to do research."²¹

But government-sponsored tort litigation is only part of the mix. Governments are not the only ones strategizing. Plaintiffs' lawyers are increasingly coordinated in strategy and funding—using one large fee (generated from a substantial judgment or settlement) as the seed money for a coordinated attack on their next target. Evidence of this surfaced in February, when a group of plaintiffs' lawyers who participated in the 1998 state tobacco litigation reached a deal with institutional investors converting nearly \$1 billion in legal fees that would have been paid over 12 years into \$308.1 million in cash.²² Such cash will undoubtedly help finance new contingency fee projects.

Aside from the large judgments at issue in the tobacco and other government-sponsored litigations, other types of litigation, including class actions, commercial litigation, and even product liability actions are increasingly producing eye-popping verdicts of the type that could present bonding problems for some defendants.

- In December 2000, a Montgomery, Ala., court hit Exxon Mobil Corp. with a \$3.5 billion judgment (\$87.7 million in actual damages and \$3.42 billion in punitive damage) for allegedly underpaying natural gas royalties from wells in Gulf Coast waters.²³
- In October 1999, a Marion, Ill., trial court entered a judgment of almost \$1.2 billion against State Farm Mutual Automobile Insurance Co. in favor of a purported nationwide class of State Farm policyholders.²⁴ The case arose out of a longstanding State Farm practice (shared by other automobile insurers), that was fully disclosed to policyholders, of using non-Original Equipment Manufacturer (OEM) parts to repair cars after accidents. State Farm and others followed this policy to create and assure a competitive market with OEM parts and to reduce repair costs. Since State Farm is a mutual insurance company, its policyholders directly benefited from any savings from the use of non-OEM parts.
- In July 1999, a Los Angeles court ordered General Motors Corp. to pay \$1.2 billion to six people who were injured when their vehicle caught on fire after a rear-end collision.²⁵

¹⁸ Letter from Rhode Island Attorney General Sheldon Whitehouse to Idaho Attorney General Alan G. Lance, August 27, 1999.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Thomas B. Edsall, *Lawyers Get Tobacco Fees Early*, Wash. Post, Feb. 14, 2001, at A14.

²³ See Kortney Stringer, *Exxon Is Ordered to Pay \$3.5 Billion in Royalties Suit*, Wall St. J., Dec. 20, 2000, at B7.

²⁴ See *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 97-L-114, 1999 WL 955543 (entering judgment of \$456,636,180.00 on one count of class action complaint) (Ill. Cir. Ct. Oct. 8, 1999). See also Deborah Lohse, *Policyholders of State Farm Mutual Are Awarded \$730 Million in Damages*, Wall St. J., Oct. 11, 1999, at B12 (describing additional award of \$730 million in punitive and other damages to plaintiff class, bringing total award to \$1.2 billion).

sion.²⁵ The trial court judge refused to allow the jury to learn that a speeding drunk driver caused the crash.²⁶

- On Jan. 30, 2001, the front page of the *New York Times* reported about a new study by a nonpartisan group which found that the median product liability award—not including punitive damages—has more than tripled since 1993, from \$500,300 to over \$1.8 million in 1999.²⁷ "Most of that rise has come in the last three years, and awards are now growing at the fastest rate in two decades."²⁸

With verdicts such as these being handed down with greater frequency, it does not take a soothsayer to predict that, unless reformed, the existing bonding rules in many states increasingly threaten the right of appeal of corporate defendants and may force some employers into bankruptcy.

Bonding Reform Is Needed as a Matter of Fairness

Civil defendants should have full access to a state's appellate court system to challenge an adverse judgment—just as losing plaintiffs should have the ability to test their case on appeal. The defendant's right to an appeal is particularly important if the verdict contradicts settled legal principles, is based on novel and untested theories of liability, was the product of bias or prejudice, or is so large as to "shock the conscience" and violate constitutional due process protections. The current bonding statutes in many states, however, stand as a potential roadblock to keeping some defendants from obtaining appellate review of such cases.

When faced with an exorbitant judgment and a concomitant equally exorbitant bond to stay a judgment pending appeal, many defendants (even large corporations) may be unable to post the bond necessary to pursue an appeal lest they face bankruptcy. There is no way for a defendant to appeal the judgment when it is financially unable to do so.

The consequences of this can be quite disturbing. Picture the following scenario. A state executive brings a state-sponsored lawsuit against an out-of-state corporation, or a trial court certifies a nationwide class action against the company. Maybe the defendant is unpopular for one reason or another. The trial judge allows the case to proceed based on a novel legal theory. Prejudicial and inflammatory evidence is paraded before the jury. The jury returns an unconstitutionally excessive punitive damages verdict.

If that verdict is more than the defendant can bond, there is nothing that defendant can do to reverse the plainly erroneous and unconstitutional judgment. The defendant's right to an appeal is effectively blocked. Ironically, the more egregious the errors at trial and the more outrageous the award, the more likely it is that the defendant will be unable to post a bond sufficient for the judgment to be appealed. The very cases that cry out for appellate review are the ones that defendants may not be able to appeal. That result is entirely unfair, and wrong.

There is only one way for a defendant to avoid this fate, and it is equally disturbing—the defendant must

²⁵ See *California: GM Appeals \$1.2 Billion Award in Fiery Crash, Liab. & Ins. Wk.*, Dec. 11, 2000, at 7.

²⁶ See *id.*

²⁷ See Greg Winter, *Jury Awards Soar As Lawsuits Decline on Defective Goods*, *New York Times*, Jan. 31, 2001, at A1.

²⁸ *Id.*

settle, sometimes at a "premium" rate, even if it believes the plaintiffs' case is flimsy or without merit.

Bonding statutes should not be permitted to be abused this way—as a tool to facilitate legal extortion.

States Have Acted

Recognizing this problem, several states have wisely begun to adopt legislation bringing fairness to the bonding process. In 2000, Florida, Georgia, Kentucky, and North Carolina all adopted legislation to limit the amount of the bond a defendant must post in order to appeal an adverse judgment, while fairly protecting plaintiffs' ultimate chance for recovery should the plaintiff prevail on appeal.²⁹ The reforms have their genesis in a proposal by ALEC to ease oppressive bonding requirements and protect the right to appeal, a proposal that is now being considered in Kansas³⁰ and deserves consideration in other states as well.

ALEC'S Model Appeal Bond Waiver Act

ALEC's Model Appeal Bond Waiver Act is a sound and fair proposal that is needed to protect the right to an appeal in civil cases in the new litigation environment.³¹ The Model Act bill would place a cap of \$1 million on the appeal bond for judgments valued over \$1 million and cap the appeal bond at \$25 million for judgments valued over \$100 million. These limits would apply both for judgments entered in the state enacting the proposal, and in the situation where a plaintiff who has secured a judgment in another state seeks to enforce that judgment in that state.

The Model Act in no way limits the amount of damages that can be imposed in litigation either in the enacting state or elsewhere. The Act is merely intended to ensure that a defendant can appeal a massive judgment without being put out of business by a plaintiff who seeks to execute on that judgment, because the defendant cannot afford to post the appeal bond that otherwise would be required.

The model legislation also allows courts to penalize litigants who attempt to use the bond reform to divert assets while the appeal is pending in order to avoid pay-

²⁹ See *Fl. St. Ann. § 768.733* (2000) (bond for punitive damages portion of class action judgment may not exceed \$100 million or 10 percent of defendant's net worth, whichever is less); *Ga. Code § 5-6-46* (2000) (bond for punitive damages portion of judgment may not exceed \$25 million); *Ky. St. Ann. § 411.187* (2000) (bond for punitive damages portion of judgment may not exceed \$100 million); *Va. Code § 8.01-676.1* (2000) (bond for punitive damages portion of judgment may not exceed \$25 million); *N.C. St. Ann. § 1-289* (2000) (bond for punitive damages portion of judgment may not exceed \$25 million). Several states have adopted appeal bond reforms that apply only to tobacco product manufacturers that have signed onto the state attorneys general litigation Master Settlement Agreement. See 2001 Okla. Sess. Laws Serv. Ch. 66 (S.B. 372 (West 2001) (bond for tobacco product manufacturer may not exceed 100 percent of judgment or \$25 million, whichever is less) (signed by Governor April 10, 2001); 2001 W. Va. S.B. 661 (signed by Governor May 5, 2001) (bond for tobacco product manufacturer may not exceed \$100 million for compensatory damages and \$100 million for punitive damages).

³⁰ See *Kan. H.B. 2222* (2001).

³¹ The full text of ALEC's Model Appeal Bond Waiver Act is available at: <http://www.alec.org>.

ing the damages judgment when the appellate process comes to an end.

Such protection puts defendants on a more equal footing with plaintiffs, whose right to appeal a dismissal of a case is unobstructed by financial obstacles. Moreover, the model legislation addresses the basic reason for the bonding rules. If there is no threat that a defendant will dissipate or divert its assets, sound public policy suggests that the defendant's right to appeal should not be hampered based upon its financial wherewithal.

Trial Court Discretion Insufficient

Some may ask why bond waiver reform legislation is needed in light of the fact that many trial courts have the discretion to waive an appeal bond (in full or in part) upon a showing of good cause. The reason is that there is a substantial risk that a trial judge who is willing to accept a novel liability theory or award an exorbitant judgment against a defendant will be unwilling to exercise such discretion in favor of that defendant. This risk can be especially high for out-of-state defendants, because some courts are presumably more likely to favor the interests of their own citizens over those of a nonresident, particularly if the defendant is a large corporation. The bar to appeal created by existing bonding requirements could place an entire industry at the mercy of a single trial judge. Bond waiver legislation is the only way to achieve a uniform system to ensure fairness in civil litigation.

Constitutional Rights Support Reform

Fundamental due process and equal protection principles support the adoption of bonding reform. As the United States Supreme Court has explained in another context, "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms."³² Bonding requirements that make it impossible to pursue an appeal that would otherwise be available effectively withdraw the right to appeal, and are, therefore, not only unsound but also constitutionally defective. Similarly, such requirements may run afoul of the Equal Protection Clause by creating a system that treats defendants "differently for purposes of offering them a meaningful appeal" based on their capability of sustaining a bond payment without going bankrupt.³³ Adoption of bonding reform legislation based upon ALEC's Model Act will help ensure that a lack of resources does not result in a denial of constitutional due process or equal protection safeguards.

CONCLUSION

ALEC's Model Appeal Bond Waiver Act provides a sound and fair solution to the bond bar that has recently emerged in the context of new types of liability litigation. It makes good public policy sense, and should be enacted by state legislatures.

³² See *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) (describing the principle that, once a state sets up a system of appellate review, it must operate that system in accord with due process and equal protection).

³³ See *id.* (discussing cases involving indigent defendants that are denied an appeal, for example, because they are unable to afford a transcript, in violation of equal protection and due process).