



The Appeal Bond—What It Is, How It Works, and Why It Needs to Be Factored Into Your Litigation Strategy



When a business is hit with a bet-the-company product liability lawsuit—for instance, a putative nationwide or statewide class action—the defendant and its lawyers spend a lot of time at the outset thinking about case strategy and putting dollar-and-cent values on a range of issues. What will it cost to defend the lawsuit? Is the company likely to get a fair shake in the forum and, if not, is it possible to change the venue? Who makes up the potential jury pool, and what is the range of jury verdicts in the jurisdiction? What are the odds of winning or losing at trial and on appeal? Based on all of the known factors, is the case one that should be settled or tried?

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But one question that often is *not* asked early in the case is one whose answer can fundamentally change the strategy of the case: How much will it cost the defendant to appeal an adverse judgment? We're not talking about attorneys' fees or the associated costs of appeal, although these are important considerations. Instead, we're talking about the bond a losing defendant must pay to secure its right to appeal and stay the judgment. This bond is called a "*supersedeas* bond," commonly referred to simply as an "appeal bond." It is a requirement of the federal courts and every state court. Though the specific requirements vary widely, every jurisdiction requires the defendant to post

some form of bond in order to appeal an adverse judgment and stay the plaintiff's execution of that judgment.

Failing to take the appeal bond into account in the early stages of case evaluation and strategy can put a defendant and its lawyers in a very uncomfortable position if, despite their best efforts and superlative lawyering, the company loses at trial and faces an adverse judgment. For instance, in a handful of jurisdictions today, the defendant is required to post the full amount of the judgment plus interest as an appeal bond. When the potential worst-case scenario is a

multibillion-dollar judgment, posting such a bond could be devastating for the company and its employees, particularly since the defendant must often post the bond within a few weeks of an adverse judgment.

The most famous example of the difficulties created by an appeal-bond requirement in a “blockbuster” case is *Pennzoil v. Texaco*, in which Pennzoil won a \$10.5 billion verdict against Texaco.¹ The Texas appeal-bond rule required that Texaco post the entire amount of the judgment, plus interest, to stay execution of the judgment. After numerous unsuccessful efforts to avoid the appeal-bond requirement, Texaco filed for bankruptcy protection, which, by virtue of the automatic stay provisions of the Bankruptcy Code, effectively stayed execution of the judgment and led to a settlement. A more recent example is the *Price v. Philip Morris* class-action case in Illinois, where Philip Morris was hit with a \$10 billion judgment.² Philip Morris would have been required to post \$12 billion to stay execution of the judgment pending appeal, but the court reduced that amount by half following severe public scrutiny of the case. For a time, however, it appeared that Philip Morris would not even have an opportunity to contest the judgment—which would have been a sad result, given that the Illinois Supreme Court later reversed the judgment and ordered the case dismissed.³

For smaller companies, even much smaller bond amounts may be impossible to obtain. In many cases, the company itself will lack sufficient funds to self-finance the bond and thus will need to turn to third parties. This is unlikely to be an easy task. The process can be as time-consuming and complex as a multitier financing effort.

Even the most sophisticated analysis of the odds of reversing an adverse judgment on appeal is worthless if the bonding requirement precludes an appeal. Knowing what it may cost to appeal an adverse judgment early in the case, therefore, is just as critical as getting an informed sense of what the exposure is with respect to the judgment itself. It can affect the fundamental decision of whether to try or settle the case.

THE APPEAL BOND: WHAT IT IS AND WHAT IT DOES

A *supersedeas* or appeal bond is a “bond required of one who petitions to set aside a judgment or execution and from

which the other party may be made whole if the action is unsuccessful.” *Black’s Law Dictionary* 1438 (6th ed. 1990). To be clear, an appeal bond is not, technically, a requirement for appeal. It is, instead, a device that allows the court to stay the execution of the judgment while the matter is on appeal. Generally speaking, a defendant can appeal without posting a bond, but in that case the plaintiff is free to execute on the judgment it has obtained while the appeal is pending. If the defendant succeeds on appeal, it would then have to (a) file a separate action to recover from the plaintiff the money the plaintiff collected from it following judgment, and (b) collect on any judgment it obtains.

For most defendants, that is not a realistic option. Aside from the potentially disruptive, if not devastating, effect of doling out millions of dollars (or more) to a plaintiff whose claims may be meritless, there is no guarantee the defendant company will be able to get its money back after the appeals process has run its course. To get the money back, the company would have to file a lawsuit, win, and then seek to collect—all of which costs time and money. A plaintiff may have taken steps to make himself “judgment-proof” during the pendency of the appeal. After being vindicated in the court of appeals, a defendant could nonetheless find that it cannot get its money back. That is not a happy situation. The appeal bond allows a defendant to avoid these problems.

From the plaintiff’s perspective, the appeal bond ensures that, if the trial judgment is affirmed on appeal, money will be available to him at the conclusion of the appellate process, which could be years down the road. Just as the defendant has concerns about its ability to collect from the plaintiff months or years later, the plaintiff has concerns about his ability to collect from the defendant. From the plaintiff’s perspective, during the time it takes for the appellate process to conclude—an average of 12.2 months in the federal system⁴—the corporation could go bankrupt or otherwise be in a position that renders collection difficult or impossible. The plaintiff wants assurance that the judgment will be worth something if it is upheld on appeal.

Thus, both the defendant and the plaintiff have an interest in ensuring that there will be a pot of gold at the end of the rainbow. The defendant wants the entire pot back, and the plaintiff wants to take it. But the pot has to be there for both parties.

THE REQUIREMENTS OF AN APPEAL BOND VARY WIDELY AMONG JURISDICTIONS, AND MOST STATES HAVE REFORMED THEIR STATUTES WITHIN THE LAST 10 YEARS

Federal Rule of Civil Procedure 62 supplies the general rule for *supersedeas* bonds in the federal courts. Under that rule, a plaintiff cannot execute on a judgment until 10 days after the judgment has been entered. To stay the execution of a judgment as a matter of right, the defendant must provide a *supersedeas* bond at or after filing a notice of appeal. Fed. R. Civ. P. 62(a), (d). The amount of the bond is the amount of judgment, plus interest and costs. *Id.*

It is important to note, however, that in the federal system, the district court has discretion to set a lower bond or to not require one at all, provided the defendant shows “good cause” (e.g., liquidity, burden, etc.) for doing so. See, e.g., *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986). The federal rule is in contrast to some state jurisdictions, which give the lower court no discretion to reduce the amount of the bond. (In Virginia, for instance, the trial court does not have authority to alter the amount of the bond. See *Tauber v. Commonwealth ex rel. Kilgore*, 562 S.E.2d 118 (Va. 2002).)

In the past eight years, a staggering number of states have reformed their appeal-bond statutes, most by capping the amount that must be posted. The reform efforts were championed by the American Tort Reform Association (“ATRA”) as part of an overall tort-reform effort. See Peter Geier, “States Looking at Appeal-Bond Caps,” *National Law Journal* (March 26, 2007). ATRA’s efforts were inspired by several high-profile, large-dollar judgments. Since 2000, 39 states have amended their appeal-bond laws by lowering the bond requirements or otherwise making the securing of an appeal bond less onerous for defendants. See *id.* Four states—Alaska, Maryland, New Mexico, and Wyoming—reformed their appeal-bond statutes just this year. *Id.*

A few examples will illustrate the variety among the states:

- In Wyoming, a defendant cannot be required to pay more than \$25 million to stay execution of the judgment pending appeal, and businesses with 50 or fewer employees (deemed “small” businesses) cannot be required to pay more than \$2 million.
- Hawaii, in 2006, passed a similar reform but limited the amount small businesses can be required to post to \$1 million.

- Georgia reformed its appeal-bond statute in 2004 by capping the appeal bond at \$25 million for all damages; previously, that cap applied only to punitive-damages awards.
- In Oklahoma, unless the defendant is a signatory to the Master Settlement Agreement (“MSA”), it must post a bond equal to double the judgment, though the trial court has discretion to lower the amount if the defendant can demonstrate that it is likely to suffer substantial economic harm.
- In 2002, Ohio imposed a \$50 million cap on appeal bonds.
- Mississippi, in 2001, imposed a three-part limit on appeal bonds, under which a defendant is required to post an appeal bond covering punitive-damages awards of the lesser of (a) \$100 million, (b) 125 percent of the judgment, or (c) 10 percent of the defendant’s net worth.

(Each of these examples is identified on the ATRA web site at <http://www.atra.org/issues/index.php?issue=7488>; last visited on February 25, 2008.)

Other appeal-bond reforms were directed only at particular classes of defendants. A number of states, for instance, imposed appeal-bond caps for the benefit of signatories to the MSA between the states and several tobacco companies arising out of the states’ Medicaid reimbursement lawsuits against the tobacco industry.

About the only place where reform efforts failed was Illinois—an interesting development insofar as it was the judgment in *Price v. Philip Morris* that inspired the reform movement. The plaintiffs’ bar, which is notoriously powerful in that state, defeated efforts to reform the appeal-bond requirements. Thus, corporate defendants in Illinois continue to face the same risks that almost prevented Philip Morris from appealing the judgment against it—a judgment that the Illinois Supreme Court ultimately reversed.

There are other wrinkles in the appeal-bond statutes of the various states, and the curious reader can see them by visiting ATRA’s web site, <http://www.atra.org>. But our point here is not to compare and contrast the jurisdictions. It is more basic: The defendant and its lawyers need to familiarize themselves with the appeal-bond requirements of the particular jurisdiction in which they have been sued. They cannot simply assume that the rules are the same everywhere.

THE ARGUMENTS FOR AND AGAINST APPEAL-BOND REFORM AND CAPS

It seems obvious that the opponents of appeal-bond reform did not persuade many legislators, insofar as 39 states have significantly changed the rules that govern appeal bonds—most by capping the amounts defendants must post. Nonetheless, it is worth exploring the arguments advanced by opponents of such caps.

Opponents of appeal-bond caps make three principal arguments. First, they claim that justice delayed is justice denied. They maintain that appeal-bond caps make it easier for defendants to “wait out” plaintiffs, who may die, lose interest, or feel financial pressure to compromise the judgment they obtained.⁵ This, however, is not so much an argument about appeal bonds as it is about the right to appeal itself. It is the appeal that takes time and “delays justice,” not the bond, and no one can seriously contend that the right to appeal should be restricted or eliminated simply because it prolongs the litigation. Doing it right is more important than doing it quickly, and the higher the stakes, the more true that principle becomes. Since a large number of “blockbuster” judgments are reversed on appeal—Exhibit A is the Supreme Court’s recent punitive-damages jurisprudence—the “doing it right” part of the equation has increased in significance.

Second, and relatedly, opponents argue that caps allow corporations to take advantage of the “time value of money.” If, for instance, the return the company would realize by redeploying the money it would otherwise pay the plaintiff exceeds what it would cost to obtain an appeal bond, corporations can play the waiting game. It really is an empirical question of whether, at any given time, the return on redeploying capital is more than the cost of the appeal bond. But this argument overlooks the fact that a large judgment against a corporation has deleterious effects on the corporation in several ways; the larger the judgment, the greater the impact. A corporation hit with a gigantic judgment will have a more difficult time gaining access to investments and loans. Moreover, potential acquirors are likely to shy away from companies with large, unsatisfied judgments. Thus, the corporation has no more incentive to drag out the appeals process than the plaintiff has.

Finally, opponents argue that appeal-bond caps are the result of corporate power and influence and represent

legislative favoritism of certain industries, pointing to the fact that several appeal-bond reforms were directed at capping bonds for tobacco companies. This argument, however, ignores the fact that most reforms are industry-neutral. There are, in any event, sound reasons for capping tobacco companies’ appeal bonds. Most of the lawsuits against the tobacco industry that succeeded at the trial level (a small percentage of the cases brought) were ultimately found, on appeal, to be groundless. Large tobacco trial judgments are routinely reversed or significantly reduced. Moreover, several states had come to depend on the money made available to them under the MSA, and they did not want to risk losing that cash.

Proponents of appeal-bond reform were successful not only because they had good responses to the objections outlined above, but also because their case for reform resonates with basic notions of justice and fair play. Reduced to its essentials, their argument is that everyone should have the right to appeal. The more expensive it is to appeal a decision, the less likely a losing party will be to appeal the case. Bad decisions will go unchecked and injustices will be allowed to stand unchallenged. Justice delayed *might* serve to deny justice, but closing the courthouse doors most assuredly *does* deny justice.

A review of recent “blockbuster” judgments bears this out. Huge damages awards—particularly punitive-damages awards—are frequently reversed or at least substantially reduced. *Price v. Philip Morris* is a prime example. And the United States Supreme Court’s punitive-damages jurisprudence over the last decade provides further evidence. The fact of the matter is that huge verdicts rarely survive appeal intact.

Also worth noting is the lack of symmetry between defendants and plaintiffs in large-dollar product liability and quasi-product liability cases. A plaintiff who loses in the trial court generally does not need to post a bond because there is no judgment to protect. The plaintiff has nothing to lose by appealing, except attorneys’ fees and other costs. And in a typical contingent-fee-based product liability case, the plaintiff probably will not have to pay those costs either. The plaintiff has all the leverage. Capping the amount of bond merely serves to level the playing field.

Finally, we should not overlook the fact that defendants cannot appeal just because they lost in the trial court.

There must be good grounds for filing an appeal, and there are serious professional consequences for lawyers who file meritless appeals. Thus, while delay may be a consequence of appeal, and while making it less financially onerous for a defendant to appeal might increase the number of appeals (an empirical question, at any rate), caps on appeal bonds should not increase the number of appeals filed for delay's sake. If appeals filed for delay's sake are a problem—and there is no evidence that they are—the solution is to amend the rules governing the grounds for appeal and the obligations of lawyers filing such appeals, not to make it financially impossible for defendants to stay execution of a judgment pending appeal.

Failing to take the appeal bond into account in the early stages of case evaluation and strategy can put a defendant and its lawyers in a very uncomfortable position if, despite their best efforts and superlative lawyering, the company loses at trial and faces an adverse judgment.

A MODEST PROPOSAL FOR FURTHER REFORM

From our vantage point as product liability lawyers, we question whether the reforms go far enough. In the typical, large-scale product liability case, an automatic or presumptive appeal-bond requirement seems to make little sense. Most of the defendants in the types of cases that result in blockbuster judgments are large, established corporations with substantial financial resources. They are not companies on the brink of financial ruin or in danger of disappearing and thus do not create any genuine risk that plaintiffs will be left with nothing. If they were, chances are the plaintiffs' lawyers would not have targeted them in the first place. Plaintiffs' lawyers look for deep pockets without lots of holes.

One approach would be to reverse the presumption by making a stay of execution the default rule, without any bond requirement (or only a nominal amount), and putting the burden on the plaintiff to demonstrate that a bond (or a larger bond) should be required. A showing similar to that demanded for a preliminary injunction could be required. Thus, the plaintiff would have to demonstrate, among other things, a risk of irreparable harm in the absence of an appeal bond, which would obviously entail showing that the defendant would be unable to pay the judgment. Given the rate of reversals in large-scale cases, putting the onus on the plaintiff to show the need for an appeal bond makes more sense than the current approach.

We anticipate that plaintiffs' lawyers would raise several objections to such a regime. The first is that it would so compromise judicial efficiency as to prove unworkable because it would necessitate virtual mini-trials, discovery, and the associated delay and expense. The fact of the matter is, however, that in the typical large-judgment case involving punitive damages, there already has been an inquiry into the financial health of the defendant—which would be the principal focus of the bond determination. Consequently, additional discovery would seem to be the exception rather than the rule. Both the scope of discovery and the complexity of any bond-determination hearing would, in most cases, be minimal.

Another objection is more fundamental. The plaintiff won at trial and obtained a judgment. Why should he bear the burden of protecting that judgment? This is a fair point but, ultimately, one that proves too much. After all, the very same



objection could be made against allowing a stay of the judgment's execution in the first place.

Under the prevailing presumptive appeal-bond requirement, the plaintiff has tremendous leverage over a defendant and can use the bond requirement to extort a settlement, no matter how tenuous the judgment or how meritorious the appeal. But rules are supposed to be fair and not favor one side or the other. Therefore, maintaining the plaintiff's unfair leverage cannot be a sound justification for the rule. Shifting the burden does no more than level the playing field, which should be a worthy goal.

FOREWARNED IS FOREARMED: THE APPEAL BOND AND LITIGATION STRATEGY

Further reform any time soon is unlikely. So, as a practical matter, product manufacturers should focus on making the potential need for an appeal bond part of their strategic thinking and planning. As a matter of strategy, point No. 1 is that the sophisticated product manufacturer and its lawyers must give serious thought to the appeal-bond requirements of the jurisdiction in which it faces significant litigation *at the beginning of the case*. Postjudgment is too late to become familiar with the appeal-bond requirements. If the jurisdiction is notoriously hostile to corporate defendants and the potential exposure approaches or exceeds the appeal-bond cap, the defendant must evaluate whether this is a case it is willing and able to litigate. Early in the case, defendants should explore and analyze options for securing an appeal bond for whatever amount is required. Depending upon how the case progresses, it may even be wise to prepare internal term sheets in anticipation of securing a bond, to the extent the corporation is unable to bond a judgment on its own. Throughout the litigation, the appeal bond should be factored into the analysis, just like other contingencies.

Potential sureties should be identified and investigated. Negotiating the terms and conditions of a surety agreement with the handful of companies able to provide such amounts will take weeks, if not longer, particularly since more than one surety is almost certainly going to be necessary in the event of a mega-judgment. Thus, it may make sense to identify and involve them early on in the process. As a practical matter, a surety will likely want to know a lot about the case, and waiting until judgment has been entered to involve the surety

may be too late. Delicate issues of privilege and work product will need to be considered, since sureties will seek to learn about the lawyers' evaluation of the case. Thus, on top of the usual complexities associated with any high-stakes financial deal, the appeal-bond context requires an evaluation of the strengths and weaknesses of the defendant's case.

Simply knowing what the bond requirements are will help the corporation and its lawyers devise an appropriate litigation strategy and give the corporation a leg up in the event of an adverse result in the trial court. The case may or may not be worth pursuing through trial and appeal, but you cannot evaluate that risk intelligently without knowing whether, as a practical matter, you can defer paying millions or billions while the appeal is proceeding.

NO ONE CONSIDERED THE APPEAL BOND BEFORE, AND THE DEFENDANT HAS JUST BEEN HIT WITH A \$10 BILLION JUDGMENT. NOW WHAT?

But suppose the corporation and its lawyers find themselves on the receiving end of a substantial adverse judgment, and they did not focus on the appeal-bond requirements beforehand—as we have recommended. Suppose further they are shocked to learn that, to appeal, they must post the full amount of the judgment, plus interest, and they must do so within 30 days. What can they do? Unfortunately, the options at this point are limited.

Even with the best lobbyists in the world, it is too late to reform the appeal-bond requirement. What, then, are the alternatives? The corporation can seek to locate sureties, banks, insurers, and other financial institutions after judgment. As might be expected, there are companies that specialize in appeal bonds, and some even have web sites, including the aptly named appealbond.com. Such services, however, are intended for more quotidian bond amounts. If the amount is in the tens of millions, hundreds of millions, or billions of dollars, the company will have to turn to more sophisticated providers. Reaching agreements with various financial institutions is going to be difficult, and probably impossible, within the time available.

About the only realistic option available to a corporation in this situation, other than trying to obtain additional time to post a bond, is to forge a creative solution with the court and opposing counsel. One possibility is to work out an agreement

with the plaintiff's counsel in which the defendant pays counsel some nonrefundable amount in exchange for counsel's agreement that the defendant may post a bond in an amount less than what the appeal-bond statute requires. This may work; it may not. The plaintiff's lawyer has most, if not all, of the leverage, and he could simply refuse. But as the saying goes, a bird in the hand is worth two in the bush. From the plaintiff's (and certainly his lawyer's) perspective, there is always a risk of reversal in whole or in part on appeal. A plaintiff may more easily accept the risk of trying to collect on a large judgment in the future—which may not even survive appeal—in exchange for a relatively small amount of nonrefundable cash. The biggest problem with this approach, however, is that it may not be up to the lawyers. The court may conclude that it lacks discretion to allow a lower amount. In the case of a class action, there may be additional problems, including whether the payment is to be regarded as a form of settlement and is thus subject to a time-consuming fairness-hearing process (if the state has such a requirement, as many do).

Bankruptcy is a possibility, but it is not an attractive option and perhaps not even a viable one. Texaco pursued this strategy to apparent success. Since that time, however, bankruptcy rules have been tightened, and case law has made clear that bankruptcy for the sake of avoiding judgment will not be countenanced.⁶

Likewise, a defendant is not likely to succeed in obtaining an injunction in federal court to stop the execution of the judgment or challenge the constitutionality of the appeal-bond statute. That effort was rejected in *Pennzoil v. Texaco*, and it has been rejected just about every time it has been tried since. The courts, relying on *Younger* abstention principles, reason that the defendant may pursue its constitutional objections in state court, thus obviating the need for federal-court intervention.

CONCLUSION

Barring a substantial reform, such as that proposed in this article, the appeal-bond requirement is likely to remain a staple of litigation for years to come. Though often overlooked, the fact and amount of a potential appeal bond can be significant issues in any product liability case, but they are particularly significant in large-scale, bet-the-company cases.

Consequently, the appeal bond should be treated like other significant risks in the case and given due consideration early in the litigation and repeatedly throughout the conduct of the case. Failing to do so can lead to serious, and unpleasant, consequences down the litigation road. ■

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¹ *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), cert. denied, 485 U.S. 994 (1988); Doug Rendleman, "A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform," 39 *Akron L. Rev.* 1089, 1106–1107 (2006).

² *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. 2003), rev'd, 848 N.E.2d 1 (Ill. 2005), reh'g denied, 846 N.E.2d 597 (Ill. 2006). Journalist Steve Whitworth discusses the case in "Supreme Court Turns Out the 'Lights,'" *The Telegraph* (Nov. 28, 2006).

³ The enormity of the problem presented by the appeal-bond requirement is illustrated by the fact that the interest on the bond—which Philip Morris did not recover—was enough to finance a number of expensive endeavors in Madison County. According to news accounts, Madison County earned \$176 million in interest from a portion of the bond deposited in an escrow account. The county used that money to "pa[y] off virtually all county debt"; pay for the county's administration and criminal courts buildings; establish an early-retirement system for county employees; and install a \$2 million, state-of-the-art 911 dispatch system. See Whitworth, *supra* note 2.

⁴ See Admin. Office of the U.S. Courts, Statistical Tables, Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit for 2006, available at <http://www.uscourts.gov/judbus2006/contents.html> (last visited February 25, 2008).

⁵ See Rendleman, *supra* note 1 at 1094.

⁶ See *id.* at 1106–1107.