

POLICY BRIEF



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Bonds. Appeal Bonds.

Protecting the Right to Appeal in the Era of Multimillion Dollar Verdicts

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Introduction

The right to appeal is a critical element of a fair and just legal system, especially in today's era of multimillion dollar verdicts. However, the current Arizona Rules of Civil Appellate Procedure do not effectively ensure that defendants will have the resources to access the appeal process. Recognizing that a defendant may lack the ability to appeal an adverse ruling, and may therefore be more willing to settle before trial, plaintiffs have an incentive under the current structure to seek the highest level of damages possible. This increases the risk of operating a business in Arizona compared to states that protect the right to appeal by capping appeal bonds.

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The Appeal Bond

At the conclusion of a civil trial, both plaintiffs and defendants have the opportunity to appeal an unfavorable judgment. However, for losing defendants in most states, filing an appeal does not prevent the collection of any damages that may have been awarded. To stay the execution of the judgment and protect assets from collection during the appeal process, the defendant must also post an appeal, or *supersedeas*, bond.

While judges in some jurisdictions have a certain level of discretion in setting the size of the appeal bond, they are generally set at a level equal to the full amount of the judgment.¹ When judgments are relatively small, the appeal bond effectively serves the interests of both parties by protecting a defendant's assets from collection until the final resolution of the lawsuit and providing the plaintiff with security that money will be available for collection if the original ruling is upheld. However, large verdicts can create situations where the size of the required bond blocks a defendant's access to the appeal process.

When judgments reach a level that would force defendant companies to cease operations and liquidate assets in order to post the bond, they are

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essentially shut out of the appeal process. This was the case for the Loewen Group, a funeral chain that lost a \$500 million lawsuit and faced the prospect of posting a \$625 million appeal bond. The value of the bond approached the value of Loewen Group's entire net worth and threatened to bankrupt the company. To prevent a bankruptcy filing, they ultimately settled for \$175 million.² This type of scenario that forces companies to choose between a settlement or an appeal that results in bankruptcy constitutes a violation of a defendant's due process rights.

Even if the bond does not reach a bankruptcy inducing level, a large appeal bond can significantly impact the ability of the defendant company to operate. Money directed toward the bond is money that no longer can be used to create jobs and stimulate economic activity.

Since 2000, thirty eight states have taken steps to protect a defendant's right to appeal by capping appeal bonds. However, Arizona Rule of Civil Appellate Procedure 7(a)(2), which guides judges to set the bond at the full size of the judgment plus costs, interests, and any damages which may be attributable to the stay pending appeal, fails to provide the same level of protection. Adopting a reasonable appeal bond cap would improve Arizona's business environment by reducing the risk of being unable to appeal an adverse judgment.

Impact of Appeal Bond Caps

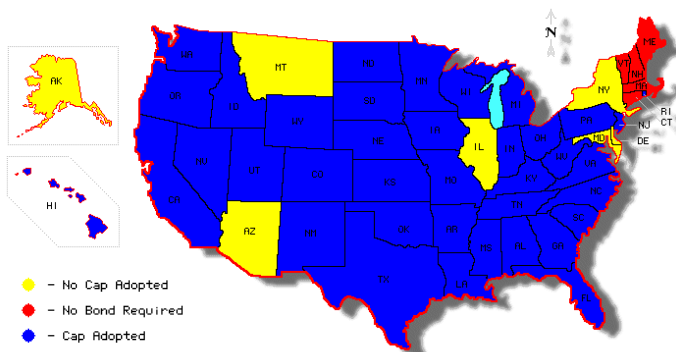
The vast majority of lawsuits are settled outside of court, and as a result the appeal bond never comes into play explicitly. However, a prudent defendant considers the potential cost of an appeal while deciding whether to settle or go to trial. When the cost of appeal is perceived to be prohibitive, the defendant's willingness to settle the case increases. This creates an incentive for plaintiff's lawyers to file lawsuits seeking large awards that are designed to force a settlement. When the cost of appeal remains affordable, a defendant's willingness to settle a case decreases, which reduces the incentive

for lawyers to pursue cases that are only intended to force a settlement.

A recent analysis conducted by the Pacific Research Institute suggests that appeal bond caps are an effective tool for keeping the cost of appeal low. Analyzing quantitative data from 1996-2005, the researchers found that in states with appeal bond caps, tort losses per capita were 4% below the 50 state median and insurance premiums per capita were 3% below the 50 state median.³

These results make sense. The "tort losses per capita" variable measures payments made by defendants (or insurance companies of defendants) for both judgments and settlements. As discussed earlier, states with appeal bond caps reduce the incentive for plaintiffs to file lawsuits that seek large awards designed to force a settlement. Without this incentive in place, one would expect the size of settlements and judgments to be relatively lower.

The same is true for insurance premiums. One would expect insurers to charge higher premiums in states with higher tort losses per capita, and lower premiums in states with lower tort losses per capita. The data supports that expectation.



Appeal Bonds in Other States

Thirty eight states in the U.S. have placed some type of limit on the size of appeal bonds, and five more states do not require any type of appeal bond. Instead, courts in Connecticut, Maine, Massachusetts, New Hampshire, and Vermont automatically stay the execution of the judgment when the appeal

is filed. Arizona joins Alaska, Delaware, Illinois, Maryland, Montana, and New York and as the only remaining states that impose appeal bonding requirements without a cap of any kind.⁴ (See Exhibit #1)

Among states with caps, the size and structure of the caps vary significantly. In most cases, the caps are set at a fixed monetary value such as \$50 million. Texas, Mississippi, Nebraska, and Florida consider the financial capacity of each defendant by capping the size of the bond at a percentage of the defendant's net worth or a set monetary value, whichever is less. Other states have special caps that apply to small businesses or punitive damages. Most recently, Oklahoma implemented a standard \$25 million cap and completely eliminated the bonding requirements for punitive damage appeals.⁵

It is also important to note that most states with appeal bond caps also include a provision that gives the court discretion to waive the cap in the event that a defendant is found to be intentionally dissipating assets for the purpose of avoiding payment. This provides additional security for plaintiffs that money will be available for collection if the original ruling is upheld.

Thirty five of the thirty eight states with appeal bond caps adopted the caps through legislation. In Mississippi, South Dakota, and Utah, the state Supreme Courts created the caps through the court rule process.⁶

Enacting Appeal Bonds in Arizona

Legislation that appears to conflict with a court rule is often subject to a Constitutional challenge regarding separation of powers between the legislative and judicial branches of government. An appeal bond cap could be interpreted as being in conflict with rule 7(a)(2) of the Arizona Rules of Civil Appellate Procedure, but a strong case can be made that an appeal bond cap is a not a *procedural* law but rather a *substantive* law. The distinction between the two is important because a procedural

law that conflicts with a court rule is superseded by the court rule, but when a substantive law conflicts with a court rule, the substantive law prevails.⁷

The Arizona courts generally consider a law to be substantive if it “creates, defines, and regulates rights” while a procedural law “prescribes the method of enforcing the right.”⁸ For example, Arizona Revised Statutes 12-2101, which details the types of judgments and orders that may be appealed, is a substantive law. The statute defines those decisions which may be appealed, but the specific actions required to exercise the right to appeal are found in the Rules of Civil Appellate Procedure.

Rule 7(a)(2) does not prescribe a method for enforcing the right to appeal, but rather a method for staying the execution of the judgment. This is an important distinction because defendants are technically capable of exercising the right to appeal without posting an appeal bond, but without any asset protections. Enacting appeal bond cap legislation would create for defendants a new right to stay the execution of a judgment without being forced to post a bankruptcy inducing appeal bond. As a result, the appeal bond cap would be a substantive law that is within the jurisdiction of the legislature.

Conclusion

The appeal bond has played an important role in the American judicial system over the years. Adopting reasonable appeal bond caps will enable the bond to continue serving its intended purpose while protecting the right to appeal in the era of multimillion dollar verdicts. This would be a positive step toward an improved business climate that could help Arizona retain and attract employers at a time when the state's unemployment rate hovers above 9%.

Notes

¹ Rendleman, Doug, A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform. Akron Law Review; Washington & Lee Legal Studies Paper No. 2006-12. Available at SSRN: <http://ssrn.com/abstract=938784>

² "Funeral Chain Settles, Avoiding a Big Bill." New York Times 30 Jan. 1996. Accessed at www.nytimes.com. 9 Dec. 2010.

³Pacific Research Institute. April 2009. "Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums."

⁴Pacific Research Institute. June 2010. "U.S. Tort Liability Index: 2010 Report."

^{5,6}America Tort Reform Association. www.atra.org

⁷ *Seisinger v. Siebel*, 203 P.3d (Ariz. 2009)

⁸ *State v. Birmingham*, 96 P.2d (Ariz.1964)

Exhibit # 1

State	Year	Cap Amount	Cap Applies to:
Alabama	2006	\$125 Million	Appeals by signatories to the Master Settlement Agreement.
Alaska	N/A	No Cap	N/A
Arizona	N/A	No Cap	N/A
Arkansas	2003	\$25 million	Appeals by defendants in all civil cases.
California	2003	\$150 million	Appeals by signatories to the Master Settlement Agreement.
Colorado	2003	\$25 million	Appeals by defendants in all civil cases.
Connecticut	N/A	Bond Not Required	N/A
Delaware	N/A	No Cap	N/A
Florida	2000	Lesser of: *10% of defendant's net worth *\$100 million	Appeals of punitive damages in class actions.
Florida	2003	\$100 million	Appeals by signatories to the Master Settlement Agreement.
Florida	2006	\$50 million	Appeals by defendants in all civil cases, excluding class actions.
Georgia	2004	\$25 million	Appeals by defendants in all civil cases.
Hawaii	2006	\$25 million	Appeals by defendants in all civil cases.
Hawaii	2006	\$1 million	Appeals by small business defendants (as defined by SBA).
Idaho	2003	\$1 million	Appeals of punitive damages.
Illinois	N/A	No Cap	N/A
Indiana	2002	\$25 million	Appeals by defendants in all civil cases.
Iowa	2004	\$100 million	Appeals by defendants in all civil cases.
Kansas	2003	\$25 million	Appeals by signatories to the Master Settlement Agreement.
Kansas	2005	\$1 million plus 25% of judgment amount > \$1 million	Appeals by defendants who can prove by preponderance of the evidence, that setting the bond at full size of judgment will lead to undue hardship or denial of right to appeal
Kentucky	2000	\$100 million	Appeals of punitive damages.
Louisiana	2003	\$50 million	Appeals by signatories and affiliates of signatories to the Master Settlement Agreement.
Maine	N/A	Bond Not Required	N/A
Maryland	N/A	No Cap	N/A
Massachusetts	N/A	Bond Not Required	N/A
Michigan	2002	\$25 million	Appeals by defendants in all civil cases.
Minnesota	2004	\$150 million	Appeals by defendants in all civil cases.
Mississippi	2001	Lesser of: *125% of judgment *10% of defendant's net worth *\$100 million	Appeals by defendants in all civil cases.
Missouri	2005	\$50 million	Appeals by defendants in all civil cases.

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State	Year	Cap Amount	Cap Applies to:
Montana	N/A	No Cap	N/A
Nebraska	2004	Lesser of: *50% of defendant's net worth *\$50 million	Appeals by defendants in all civil cases.
New Hampshire	N/A	Bond Not Required	N/A
New Mexico	2007	\$100 million	Appeals by a signatory, a successor of a signatory or any affiliate of a signatory to the master settlement agreement
New York	N/A	No Cap	N/A
Nevada	2001	\$50 million	Appeals by signatories to the Master Settlement Agreement.
New Jersey	2003	\$50 million	Appeals by signatories to the Master Settlement Agreement.
North Carolina	2003	\$25 million	Appeals by defendants in all civil cases.
North Dakota	2005	\$25 million	Appeals by defendants in all civil cases.
Ohio	2002	\$50 million	Appeals by defendants in all civil cases.
Oklahoma	2009	\$25 million	Appeals by defendants in all civil cases.
Oklahoma	2009	\$0	Appeals of punitive damages.
Oregon	2003	\$150 million	Appeals by signatories to the Master Settlement Agreement.
Pennsylvania	2003	\$100 million	Appeals by signatories to the Master Settlement Agreement.
Rhode Island	2008	\$50 million	Appeals by a signatory, a successor of a signatory, or an affiliate of a signatory to the Master Settlement Agreement
South Carolina	2004	\$0	Appeals by signatories to the Master Settlement Agreement.
South Dakota	2003	\$25 million	Appeals by defendants in all civil cases.
Tennessee	2003	\$75 million	Appeals by defendants in all civil cases.
Texas	2003	Lesser of: *50% of defendant's net worth *\$25 million	Appeals by defendants in all civil cases.
Texas	2003	\$0	Appeals of punitive damages.
Utah	2005	\$25 million	Appeals by defendants in class action cases
Utah	2005	\$0	Appeals of punitive damages.
Vermont	N/A	Bond Not Required	N/A
Virginia	2004	\$25 million	Appeals by defendants in all civil cases.
Washington	2006	\$100 million	Appeals by signatories to the Master Settlement Agreement.
West Virginia	2004	\$100 million	Appeals by signatories to the Master Settlement Agreement.
Wisconsin	2003	\$100 million	Appeals by defendants in all civil cases.
Wyoming	2007	\$25 million	Appeals by defendants in all civil cases.
Wyoming	2007	\$2 million	Appeals by small business defendants <50 employees.