



2006

## A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform

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### Recommended Citation

Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 Akron L. Rev. 1089 (2006).

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## **A CAP ON THE DEFENDANT'S APPEAL BOND?: PUNITIVE DAMAGES TORT REFORM**

*Doug Rendleman\**

In the spring of 2006, "Appeal Bond Reform," was the first subject on the American Tort Reform Association's website entry for "Issues."<sup>1</sup> That entry may draw a blank and spur a curious Web-surfer to ask, "What's an appeal bond?" and "OK, why does the appeal bond need reformed?"

### I. ITINERARY

To inquire into the world of the appeal bond, to ask how it came to the American Tort Reform Association agenda, to trace its history as tort reform, and to draw some constitutional and public policy lessons are my modest goals for this article.

The appeal bond has been an issue in huge-damages litigation. I

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\* Huntley Professor, Washington and Lee. This article, which was a long time in gestation, began with my critical report on Virginia's and the other tobacco-states' "first wave" of appeal-bond capping statutes in the 2001 annual supplement to DOUG RENDELMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA (2d ed. 1994). Although the piece retains some Virginia attributes, enthusiastic and zealous research assistants, Ms. Bryony Renner, Mr. Andrew Howard and Mr. Tim Dooley caught the "second wave" of tort-reform capping statutes and transmogrified it to a national article. Mr. Howard's and Mr. Dooley's extraordinary computer research on the state appeal-bond rules and statutes and their legislative histories broadened, expanded, and heightened my research and writing. Ms. Rachel Sederquest assisted with citations in the summer of 2006. Grateful thanks to those assistants. Thanks also to the Francis Lewis Law Center both for supporting my assistants and for augmenting my efforts with a research grant for the summer of 2005. In addition to my intellectual debts to lawyers and scholars that I have recognized in the footnotes, conversations with Professor Margaret Howard, Professor Lewis LaRue, and Mr. Mark Behrens helped me shape and direct my thinking; however, the conclusions herein are my own. During the later part of its incubation, I presented this work three times: to a Faculty Enclave at Washington and Lee in March 2005; to the Remedies Discussion Forum in November 2005, which led to this symposium; and to an AALS Remedies Section program on Tort Reform in January 2006. Thanks to all colleagues and commentators at the enclave, the forum, and the section program. Special thanks to Professor Elaine Shoben for her consistent collegiality, support, and encouragement.

1. American Tort Reform Association, <http://www.atra.org/issues> (last visited May 9, 2006).

include a capsule summary of five lawsuits with blockbuster damages in this long paragraph. The article will revisit them from time to time. They begin with *Pennzoil v. Texaco* from the 1980s in a Houston trial that stemmed from a corporate takeover gone awry. Pennzoil's jury verdict exceeded \$10.5 billion. Litigation continued in the Texas courts, the United States courts, including the Supreme Court, and the federal bankruptcy courts before the litigation was settled.<sup>2</sup> The second lawsuit is *O'Keefe v. Loewen*, where a \$500 million jury verdict was entered in a Mississippi lawsuit over two funeral home chains' failed contracts; the parties settled it for about \$175 million.<sup>3</sup> The third case is the litigation that flowed from the Exxon-Valdez oil spill in Prince William Sound that resulted in a \$4.5 billion punitive damages verdict; after protracted litigation, including three trips to the Ninth Circuit Court of Appeals, the appellate court reduced the award to \$2.5 billion in December 2006.<sup>4</sup> Our last two blockbuster verdicts were entered in smokers' lawsuits against tobacco companies. In case four, a smokers' class action in Florida, *Engle v. Liggett Group*, the jury's verdict for punitive damages for the plaintiff class was \$145 billion.<sup>5</sup> Finally, lawsuit five features *Price v. Philip Morris*, an Illinois smokers' class action against tobacco where the plaintiffs' verdict exceeded \$10 billion.<sup>6</sup> Both of our smokers' class actions ended in appellate decisions that eliminated their gargantuan compensatory damages and punitive damages verdicts.<sup>7</sup> To foreshadow this article's conclusion, the Florida and Illinois courts' decisions to reverse the two judgments confirm the point that an appeal-bond cap that facilitates defendants' appeals supports the legitimacy and accuracy of the litigation process.

Notably, the two recent blockbuster lawsuits have had smoker plaintiffs and tobacco company defendants. I will leave to others, particularly juries and judges, the dolorous duty of assessing the

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2. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. dismissed*, 485 U.S. 994 (1988).

3. *O'Keefe v. Loewen Group, Inc.*, No. 91-67-423 (Miss. Cir. Ct. 1995), *collaterally challenged*, *Loewen Group, Inc. v. United States of America*, 42 I.L.M. 811, 825-827 (2003). See also Jonathan Harr, *A Reporter at Large: The Burial*, THE NEW YORKER, Nov. 1, 1999, at 95.

4. *In re Exxon-Valdez*, Nos. 04-35182, 04-35183, 2006 WL 3755189 (9th Cir. 2006). The trial judge's last opinion is well worth reading; it was *In re Exxon Valdez*, 296 F.Supp.2d 1071, 1084 (D. Alaska 2004).

5. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 440 (Fla. Dist. Ct. App. 2003) (reversing and remanding), *approved in part, quashed in part*, *Engle v. Liggett Group, Inc.*, No. SC03-1856, 2006 WL 3742610 (Fla. Dec. 21, 2006).

6. *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).

7. *Engle*, 2006 WL 3742610, at \*22; *Price*, 848 N.E.2d at 54-55.

heinousness or not of the tobacco companies' conduct with their legal, but lethal, product as it affected their customers. The appeal-bond caps that we are studying grew out of the smokers' litigation and the tort-reform movement.

The appeal bond is a technical civil procedure and debtor-creditor subject in its own right. Moreover, the appeal bond and the recent caps I examine border on several other legal thickets. This article begins in Part II with background about appeal bonds and the way their amounts were set before tort reform. Since the defendant's cost of an appeal bond is an expense and, perhaps, an impediment to its appeal, the defendant will seek ways to surmount, reduce, or avoid the impediment. Part II then uses *Pennzoil v. Texaco*<sup>8</sup> to illustrate two of defendants' strategies for staying collection on a judgment pending review in lieu of posting a huge appeal bond—obtain a federal injunction and file for bankruptcy. This article shows why neither strategy is sufficient: the federal court's abstention doctrines militate against a federal injunction,<sup>9</sup> and the damages defendant's option to file bankruptcy to achieve the shelter of an automatic stay turns out to be an unattractive alternative.

Part II turns, finally, to the reason that appeal bonds caused defendants to writhe in earnest—titanic punitive damages jury verdicts. Tort reform, amended statutes and court rules capping appeal bonds, here enters our inquiry. Tort reformers' primary aim is to reduce or eliminate damages judgments.<sup>10</sup> An appeal-bond cap is a secondary reform that facilitates the defendant's appeal to a higher court; that appeal may, in turn, achieve one of the defendant's primary goals of reducing or eliminating a particular judgment.

Appeal-bond reform began in earnest in about 2000. The last several years have seen two waves of appeal-bond-capping statutes and rules. The article summarizes those developments in Parts III and IV. Part V includes the arguments the tort reformers made and discusses the legislative processes that facilitated the kind of tort reform involved in appeal-bond caps.

In Part VI, the article moves from the legislative chamber back to the courtroom to examine whether federal and state constitutional

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8. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

9. *Id.* at 17.

10. American Tort Reform Association, About ATRA, <http://www.atra.org/about> (last visited May 9, 2006); see also Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct*, 47 ALA. L. REV. 825 (1996) (noting that tort reform bills have been proposed every year since 1982, and the primary goal of such reforms is to protect corporations from excessive punitive damage awards).

challenges will undermine appeal-bond caps. At the federal level, Fourteenth Amendment Due Process and Equal Protection Clause challenges raise less difficult issues than the Full Faith and Credit Clause. Enforcing a sister-state judgment requires an understanding of the way the Full Faith and Credit Clause and the accompanying state law affect an appeal-bond cap. Finally, the article's last major subject touches on the nettlesome and speculative topic of litigants' state constitutional challenges to appeal-bond caps.

The article ends with an unpretentious conclusion in Part VII that some appeal-bond protection for large verdict judgment debtors is warranted in this age of mass litigation and titanic punitive damages awards, even though the protection will delay plaintiffs' collection efforts. That said, I support reform that is more circumspect than much of the appeal-bond tort-reform legislation that legislatures have enacted. That reform would, in brief, start with a presumptive full-amount appeal bond and (1) grant trial courts discretion to reduce the amount or provide alternative security, for good cause; and (2) provide for a cap on the punitive component of the award but not on the compensatory component. This would permit the appellate review necessary to confer legitimacy, ensure correction of trial court error, and facilitate the more rigorous post verdict review of punitive awards that is required by the Supreme Court's recent due-process decisions. At the same time, it would provide security for a plaintiff's post-review collection on the judgment.

## II. THE BASIC STUFF

Part II examines the varied and sometimes technical issues that will enable the reader to understand how and why appeal-bond tort reform appeared on legislative agendas. It, first, examines the important, yet conflicting purposes of the appeal bond—to facilitate appellate review of the accuracy and legitimacy of the jury's verdict, while also providing security for the plaintiff's collection efforts if the verdict is ultimately affirmed in whole or in part upon appeal. Part II also emphasizes that in the case in which the appeal bond may be the hardest for a judgment debtor to muster—a verdict comprised in part of a huge punitive damage award, the "Big One"—appellate review of the verdict is particularly important and may result in elimination or substantial reduction of the punitive award, under state statutory and federal due-process limitations on punitive damages. Part II next discusses, in yeoman-like fashion, post-verdict motions in the trial court, appellate review, the practical

issues involved in obtaining an appeal bond, and the ways in which a court sets the amount of an appeal bond prior to the recent waves of appeal-bond tort reform legislation. Part II then completes its description of tremendous punitive damage awards that set the stage for appeal-bond tort-reform legislation by examining two anodynes to cure a defendant's need to post a huge appeal bond, the federal injunction and bankruptcy, that failed as antidotes.

Part II, finally, presents the judgment debtor's dilemma, which led judgment debtors to turn to legislators for assistance, and which, in turn, led to appeal-bond tort-reform: Judgment debtors facing the biggest verdicts, which include huge punitive damages components, had significant opportunities to eliminate or reduce the amount of the punitive award on appeal. Given the amount of the verdicts, however, some judgment debtors could not mount an appeal because they were financially unable to post the bond. So, on to the basics.

*A. What's an appeal bond?*

Suppose TortCo made defective Gizmos, a product that injured or killed lots of people. The victims sue TortCo. TortCo will suffer money judgments in favor of the Gizmo's victims. We will focus here on one huge jury verdict for plaintiff Victor for \$250 million, \$225 million of it punitive damages.<sup>11</sup> If TortCo or its insurer doesn't pay Victor's judgment, Victor will collect it out of TortCo's assets. Many tortfeasor-businesses have suffered the consequences of judgments and debts that they cannot pay. Those consequences are insolvency and dismemberment in or out of bankruptcy.

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11. The jury based Victor's products liability judgment against TortCo on the defendant's fraud and reckless disregard; these findings opened the door for her to recover the \$225 million punitive damages. TortCo, the corporate defendant, carried products liability insurance with its twin benefits, the insurance company's duties to defend and indemnify its insured. Although TortCo's insurance carrier was vigorous on its behalf during the trial, some issues between the two persist. A policy maximum that limits the carrier's payments potentially exposes TortCo's assets to Victor's collection. Also, a policy exclusion for TortCo's intentional misconduct may mean that TortCo is responsible for all of the punitive damages portion of the judgment. The debate about whether a potential tort defendant may insure against its liability for punitive damages is summarized in Catherine M. Sharkey's article, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 (2005). Finally, a corporation like TortCo that files bankruptcy will neither claim exempt property, nor secure a discharge of its debts. In any event, a plaintiff's judgment for punitive damages will be likely to survive the defendant's bankruptcy. See, e.g., *Cohen v. De La Cruz*, 523 U.S. 213 (1998).

### 1. Post-Verdict and Appellate Review

The jury does not have the last word in our system. The jury's \$250 million verdict for Victor is potentially vulnerable to elimination or reduction on TortCo's post-verdict motion or on appellate review because of the huge punitive damages component of the verdict.

Post-verdict review in the trial and appellate courts, however, serves competing goals. From Victor's perspective, "Justice delayed is justice denied." The litigants should achieve finality. In particular, the winning plaintiff should be able to collect her money from a solvent defendant. A procedural system cannot reconcile these principles with the loser's appeal. The loser's appeal is, however, a fundamental feature of any system of adjudicatory decisionmaking that purports to provide accuracy and legitimacy. A stay pending appeal represents the uneasy procedural standoff between these conflicting goals: the trial or appellate court ought to be able to stay, that is to halt, the plaintiff's collection, but the defendant-appellant ought to provide security for the plaintiff.<sup>12</sup>

Some rudimentary information about appeals reveals why the defendant-appellant ought to provide security during the period between judgment and completion of appellate review. An average appeal takes about a year. In 2005 in the federal system, the median time from the appellant's filing of notice of appeal to the court of appeals's final disposition was 11.8 months.<sup>13</sup> The lawsuits involving huge amounts of punitive damages that this article features take longer at every stage, some a lot longer.<sup>14</sup>

Delay is the defendant's friend. If the defendant's cost of capital is less than the judgment interest rate, the friendship will be intimate. In the debates on an appeal-bond cap in the Alaska Senate Judiciary Committee as recorded in its Minutes, State Senator Ogan maintained that

one corporate strategy is the time-value of money and, although he believes the size of the judgments are outrageous, the corporate attorneys will wait the plaintiffs out. He noted that many participants in the Exxon Valdez case have died while the case has been held up. He cautioned if the bar is set too low, the defendant will play the time-

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12. See AM. LAW INST./UNIDROIT, ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 150-52 (2006).

13. Administrative Office of the U.S. Courts, Judicial Business 15 (2005), <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf>.

14. See, e.g., *In re Exxon Valdez*, 296 F.Supp.2d 1071 (D. Alaska 2004) (continuing litigation in 2004 regarding a jury verdict for \$5 billion punitive damages for an incident 15 years earlier, in March 1989). *In re Exxon-Valdez*, 2006 WL 3755189.

value of money game.<sup>15</sup>

A corporation lives forever, but an individual plaintiff's time horizon is always shorter.<sup>16</sup> Victor is anxious to collect her \$250 million verdict, but TortCo will seek post-verdict judicial review. Rules and statutes provide an automatic period of plaintiff's non-collection, a period of time after the judgment before her collection techniques can begin.<sup>17</sup> Filing motions in the trial court and mounting an appeal to a higher court comprise the defendant's post-verdict judicial review.<sup>18</sup> Since post-verdict judicial review can last for several years and may lead to reduction of the plaintiff's damages or reversal of her judgment, during that period the parties often negotiate toward a settlement to end the delay and uncertainty.

## 2. Post-Verdict Motions in the Trial Court

The defendant's post-verdict motions in the trial court include a judgment as a matter of law or j.n.o.v. motion for a new trial because of error, and a motion for a new trial because an excessive verdict should be remitted, that is, reduced. The defendant's post-verdict motions do not stay the plaintiff's collection, but the trial judge may stay plaintiff's enforcement pending a decision on the defendant's motions.<sup>19</sup>

The jury's verdict for the plaintiff becomes a money judgment when, after ruling on the defendant's post-verdict motions, the trial judge signs and enters a judgment and the clerk enters it on the formal docket or record.<sup>20</sup> When the judgment is officially entered, the clock starts to run on two important deadlines: the date when the plaintiff may begin to collect her judgment, and the defendant's period to file its notice of appeal.

Plaintiff becomes a judgment creditor. She qualifies, after an interval, for access to the defendant-judgment debtor's assets. After that

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15. Alaska State Legislature, Senate Judiciary Standing Committee Minutes, Feb. 20, 2004, at 17, available at <http://www.legis.state.ak.us/pdf/23/M/SJUD2004-02-200805.PDF>.

16. ALLEN C. BLUEDORN, *THE HUMAN ORGANIZATION OF TIME: TEMPORAL REALITIES AND EXPERIENCE* 111-45 (2002) (describing a 250-year corporate plan for Matsushita, at 136).

17. FED. R. CIV. P. 62(a) (ten days after entry of judgment); VA. CODE ANN. § 8.01-466 (2000) (twenty-one days after judgment).

18. Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 *HASTINGS L.J.* 1255, 1291-321 (1996) (reviewing the history and theory of post-verdict judicial review, summarizing what that review teaches us about the role of the judge versus the role of the jury, and applying the foregoing to criminal capital punishment and civil punitive damages).

19. FED.R.CIV.P. 62(b); VA. CODE ANN. § 8.01-477 (2000).

20. *Jackson v. Sears, Roebuck & Co.*, 315 P.2d 871 (Ariz. 1957).



period expires, the judgment creditor may utilize judgment-collection techniques, including garnishment, a judgment lien, and a writ of execution.<sup>21</sup>

After the trial judge in *O'Keefe v. Loewen* denied the defendant's post-verdict motions, the plaintiff's lawyer prepared lists of defendant's property and drafted notices.<sup>22</sup> "They have ten days to post the [\$625 million] cash bond. If they don't, my client will proceed to take over their assets. That's every funeral home they own, every insurance company, every cemetery, their corporate jet, and their yacht."<sup>23</sup>

### 3. The Appeal and the Appeal Bond

Lots of plaintiffs cannot collect their judgments, the particular turnips lacking any blood. An insolvent judgment debtor can file bankruptcy to shuck its debts. This article assumes that TortCo, the defendant-judgment debtor, has assets plus potential grounds for a successful appeal.

The defendant that files its notice of appeal within the prescribed period becomes an appellant in addition to being a judgment debtor. Procedural rules and statutes accommodate the parties' conflicting interests during the defendant's appeal by providing for the defendant-appellant to post an appeal bond and a supersedeas bond<sup>24</sup> to stay or suspend plaintiff's collection during the protracted appellate review.<sup>25</sup> The stays and appeal bonding procedures this article deals with are founded in rules and statutes.<sup>26</sup>

Although the judgment debtor's appeal bond performs important functions in the practical world of litigation, the legal system has not displayed it prominently on the marquee. A trial lawyer, particularly a

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21. DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA, Chps. 2, 3, 4 (2d ed. 1994) [hereinafter RENDLEMAN, ENFORCEMENT]; 11 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2903 (2d ed. 1995).

22. Harr, *supra* note 3, at 92-93.

23. *Id.* at 70, 93-94 (quoting Willie Edward Gary, O'Keefe's attorney).

24. "Supersedeas," BLACK'S LAW DICTIONARY 680 (8th ed. 2004) (Latin for "you shall desist.>").

25. Smoothing over the technical usage that an appellant's lawyer cannot ignore, a supersedeas bond stays the judgment creditor from collecting the judgment amount, FED.R.CIV.P. 62(d); an appeal bond secures the appellant's costs on appeal, FED.R.APP.P. 7, which are usually a lot less than the judgment amount. In this article, I am combining "appeal bond" and "supersedeas bond" into the phrase "appeal bond" because of the professional usage during the tort-reform debates.

26. In the absence of a rule or statute, a judge has an inherent power to stay litigation. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). For example, the judge may stay a plaintiff's "duplicative" lawsuit to await a decision in the other case.

specialist in civil defense, must learn about bonding an appeal; but the appeal bond is little taught in law school and little known in the scholarly sphere.<sup>27</sup>

The defendant's appeal bond serves competing goals. It will stay the plaintiff's immediate collection, but it will also guarantee the plaintiff's ability to collect her judgment if her damages verdict emerges from appellate review as a judgment that she can collect.<sup>28</sup> Because a professional surety is a profit-making enterprise, the judgment debtor's appeal bond with surety is not free. A professional surety will charge the appellant a three-percent fee, called a bond premium, and typically will require security, in the form of cash collateral, other collateral, or an indemnitor. The judgment debtor loses the bond premium, but it gains a breathing space during appellate review. An appeal bond may affect the parties' settlement negotiations. In particular, the judgment creditor may use the prognosis of her opponent's potentially expensive bond premium as a lever to exert pressure on it to settle on favorable terms.

The prospect of paying a bond premium may discourage a defendant from pursuing a hopeless or frivolous appeal. But a defendant that does maintain a frivolous appeal will owe interest on the judgment in the end, even without the bond.<sup>29</sup> Moreover, the federal appellate rules and similar state rules have cost-shifting provisions to sanction an appellant that has taken a frivolous appeal.<sup>30</sup>

Without the judgment debtor's appeal bond, the judgment creditor could lose out in two ways. First, the judgment creditor could fail to

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27. The literature on the appeal bond includes two articles on Pennzoil's lawsuit against Texaco in the 1980s: Elaine Carlson, *Mandatory Supersedeas Bond Requirements - A Denial of Due Process Rights?*, 39 BAYLOR L. REV. 29 (1987) and Doug Laycock, *The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention*, 9 REV. LITIG. 473 (1990). A useful short treatment from the commercial surety's perspective is James Black, Jr., *Miscellaneous Surety Bonds and the Restatement*, 34 WM. & MARY L. REV. 1195, 1198-1201 (1993), which is part of a symposium on the Restatement [Third] of Suretyship (1996). Also, Professor Mike Finch's article is about what I call the "first wave" of appeal-bond caps. See Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497 (2002). And, in her brief treatment of appeal bonds as part of larger issues of punitive damages, Professor Cathy Sharkey endorses the caps that this article examines. See Catherine M. Sharkey, *Book Review: Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 406-07 (2003) (reviewing CASS SUNSTEIN, ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002)).

28. 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL §§ 307.10-307.11 (3d ed. 2006) (explaining the purposes of appeal bonds and supersedeas bonds).

29. 28 U.S.C. § 1961; Dan B. Dobbs, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.6(6) (2d ed. 1993).

30. FED. R. APP. P. 38; VA. CODE ANN. § 8.01-271.1 (2000). See also, e.g., *Kent v. White*, 631 S.E.2d 782, 783 n.2 (Ga. App. 2006) (noting several frivolous appeal sanctions).

collect her judgment because the judgment debtor transfers or pledges its assets. However, a court would be likely to reverse or correct a judgment debtor's transfer of assets to avoid paying its judgment creditor by holding that the debtor's transfer was a fraudulent conveyance that the judgment creditor could recover.<sup>31</sup> Second, if the judgment debtor grants a security interest in its assets or if another of the judgment debtor's judgment creditors secures an attachment, execution, or judgment lien on the judgment debtor's property that outranks the judgment creditor, then she may lose her priority in those assets to that competitor.<sup>32</sup>

After her collection is stayed, the judgment creditor loses immediate access to the judgment debtor's assets, but she gains security in collecting. The defendant's appeal bond gives the plaintiff, who is, for now, an unsecured creditor, the equivalent of a security interest because she is assured of collection from the bond. So the judgment debtor's appeal bond creates a risk to its other creditors because of the bond's cost and because it gives the plaintiff-judgment creditor the equivalent of a security interest.<sup>33</sup> But without the stay, the plaintiff's unsecured status could have been short-lived. The stay of plaintiff's collection prevents her from levying a writ of execution that would create an execution lien on the defendant's personal property or filing her judgment for a judgment lien on defendant's realty.

If the appellate court affirms her judgment, plaintiff can collect from the judgment debtor or directly from the judgment debtor's appeal bond by levy of execution on it.<sup>34</sup> If the bond surety pays the judgment, the surety may repay itself from the cash collateral the judgment debtor has supplied. In addition, the surety may collect from an indemnitor or subrogate to the judgment creditor's debt to enable it to collect from the judgment debtor.<sup>35</sup>

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31. *Kent*, 631 S.E.2d at 784-85 (holding that the judgment debtor's no-consideration deed to his daughter, which was recorded the day after the plaintiff's judgment, was a fraudulent conveyance); Garrard Glenn, 1 FRAUDULENT CONVEYANCES AND PREFERENCES § 67, at 107 (2d ed. 1940); RENDELMAN, ENFORCEMENTS, *supra* note 21, §7.3(B)(7).

32. Laycock, *supra* note 27, at 514.

33. *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986). The Mississippi Supreme Court held that the plaintiff-judgment creditor was entitled to maintain his judgment lien on the defendant-judgment debtor's land in addition to the security that the defendant had posted in lieu of a bond. *Fitch v. Valentine*, No. 2006-CA-00239-SCT, 2007 WL 64232 (Miss. Jan. 11, 2007).

34. *Tauber v. Commonwealth ex rel. Kilgore*, 562 S.E.2d 118, 132 (2002), *cert. denied*, 537 U.S. 1002 (2002) (holding that a successful judgment creditor may collect by execution on the appeal bond); Carlson, *supra* note 27 at 54; WRIGHT ET AL., *supra* note 21, § 2905, at n.13.

35. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.3(4) (2d ed.

A defendant may appeal a trial court's money judgment without posting an appeal bond.<sup>36</sup> But, unless the plaintiff's collection is stayed, she may collect her judgment from the defendant's assets while the defendant's appeal is pending.<sup>37</sup> If, however, the appellate court later reverses the plaintiff's judgment, the defendant may recover restitution from the unjustly enriched plaintiff.<sup>38</sup> Restitution may be a scant comfort, however, to a defendant whose home was sold under execution following an incorrect judgment that is later reversed.<sup>39</sup>

### *B. Setting the Amount of an Appeal Bond Before Tort Reform*

Depending on the statute or rule, the defendant usually posted an appeal bond which was at least as large as the plaintiff's judgment. The bond was sometimes larger, sometimes smaller. Again, the purpose of the appeal bond is twofold: (1) it permits the losing party to obtain appellate review which confers legitimacy on the verdict by providing a check on its accuracy; and (2) it provides security for plaintiff's delayed collection if the verdict is upheld in whole or in part. Before tort reform, the various jurisdictions in the United States used one of two different types of statutes or rules to set the amount of an appellant-judgment debtor's appeal bond: (1) discretionary, or (2) mandatory, full-amount.

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1993) (contractual subrogation).

36. See, e.g., *Nastro v. D'Onofrio*, 822 A.2d 286, 289 (Conn. App. Ct. 2003) (describing a situation where a debtor appealed in California without a stay).

37. *Brinn v. Tidewater Transp. Dist.*, 113 F.Supp.2d 935, 939 (E.D. Va. 2000); *Segal v. Segal*, 863 A.2d 221, 226 (Conn. App. Ct. 2004). See also *WRIGHT ET AL.*, *supra* note 21, § 2905, at n.14.

38. *Gerald M. Moore and Son, Inc. v. Drewry and Assoc., Inc.*, 945 F. Supp. 117, 120 (E.D. Va. 1996); Restatement (Third) of Restitution and Unjust Enrichment § 18 (Tentative Draft No. 1, 2001); *Carlson*, *supra* note 27, at 56; *Laycock*, *supra* note 27, at 503, 506-07 (adding special damages to restitution and describing defendant's recovery as "damages," which, since the defendant's loss and the plaintiff's gain are usually the same, is equal to restitution).

39. *Sandra Fleishman, Foreclosure Scams on the Rise*, WASH. POST, June 5, 2005, at D2 (describing the plight of a homeowner who lost her home because she couldn't afford to post a bond). In the civil-rights movement libel litigation that ultimately led to the Supreme Court's landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the newspaper's co-defendants were ministers who could not afford to post appeal bonds to stay the plaintiff's collection of the \$500,000 jury verdict during the appeals. See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 162 (1991). Their cars were seized and sold while the appeals were pending. *Id.* After the Supreme Court reversed the verdict, the defendants got the money back. *Id.* Reverend Joseph Lowery's car had been sold for \$800. *Id.* The execution buyer, who was a member of Lowery's church, had sold it back to Lowery's wife for \$1. *Id.* "When the Supreme Court vindicated us," Lowery said, "the state [sic] had to return the money that it got for the cars. I offered it back to the member who'd helped me, but he wouldn't take it. The money went into the [civil-rights] movement." *Id.* See also, *TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* 580 (1988).

### 1. Discretionary

The federal procedure and some states' procedures start setting the defendant's appeal bond with the amount of the plaintiff's judgment as a rule of thumb and then grant the trial judge discretion, if the judgment debtor shows good cause, to reduce the bond's amount below the amount of the judgment or to change the form of security.

In the federal court, after the defendant moves for a stay, the judge has discretion to stay the plaintiff's collection.<sup>40</sup> After a plaintiff's money verdict and a defendant's appeal, the judge may, and typically does, condition the stay on the defendant's posting of a surety bond for an appellant's stay after the ten-day automatic stay.

As a matter of right, a federal-court judgment debtor may stay the judgment creditor's collection by posting an appeal bond. The judgment debtor's bonds will usually be large enough to cover costs, the judgment, and post-judgment interest.<sup>41</sup> The stay is effective when the judge approves it.<sup>42</sup> A federal court of appeals or a justice of the Supreme Court may grant further stays.<sup>43</sup>

However, if the judgment debtor shows "good cause," the federal judge has discretion to dispense with an appeal bond or to set a lower bond. The judgment debtor's good-cause factors include its solvency, its high net worth, its illiquid assets, whether the judgment debtor will provide periodic reports, and the judgment debtor's financial burden from the bond.<sup>44</sup> Although the judgment debtor's security will usually take the form of a bond with surety, the judge may choose an alternate form, for example treasury bills, a letter of credit, or a document granting the judgment creditor a security interest.<sup>45</sup>

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40. FED.R.CIV.P. 62(b); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986).

41. *Brinn v. Tidewater Transp. Dist.*, 113 F. Supp. 2d 935, 939 (E.D. Va. 2000).

42. FED.R.CIV.P. 62(d); WRIGHT ET AL., *supra* note 21, § 2905.

43. FED. R. APP. P. 8(a)(2)(E); WRIGHT ET AL., *supra* note 21, § 3954.

44. *See also N. Ind. Pub. Serv. Co.*, 799 F.2d at 281 (explaining that the bond was waived because (1) plaintiff cross appealed and sought specific performance instead of money damages and (2) defendant was "good for the \$181 million"); *Olympia Equip. Leasing Co.*, 786 F.2d at 796 (explaining alternative security when an appeal bond will create a risk to defendant's other creditors).

45. *Olympia Equip. Leasing Co.*, 786 F.2d at 796 (listing possible alternative measures: security interest, no-transfer order, and accelerated oral argument); *C. Albert Sauter Co. v. Richard Sauter Co.*, 368 F. Supp. 501, 520-21 (E.D. Pa. 1973) (holding that where defendant lacks assets for a bond, the alternative was to escrow stock securities). In *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140 (Cal. Ct. App. 2006), the parties had stipulated for treasury bills instead of a bond for the stay. *See also* WRIGHT ET AL., *supra* note 21, § 2905, at n.12.

## 2. Mandatory-Full Amount

The Texas statute that the courts applied in *Pennzoil v. Texaco* was, by contrast, absolute. To stay the plaintiff's collection, the defendant-appellant had to post a bond at least equal to the amount of the judgment.<sup>46</sup> Other full-amount appeal bond procedures added interest or an interest surrogate, for example bonding an appeal at 125% of the judgment amount, as did Mississippi while *O'Keefe v. Loewen* was underway.<sup>47</sup> When this article refers to a full-amount appeal bond, it is referring to either the full judgment amount or to that amount augmented for interest.

Under a mandatory rule or statute, to secure a stay, the judgment debtor must post a bond equal to the amount of the judgment, usually plus interest.<sup>48</sup> Indeed, in the absence of a statutory cap, the Virginia Supreme Court said that a state trial judge does not have "inherent authority" to set a solvent judgment debtor's surety bond at less than the judgment.<sup>49</sup> "The purpose of the statute," the court continued, "is to secure payment of the full judgment amount and all damages incurred as a result of the suspension of execution of the court's decree."<sup>50</sup> Any "lesser amount would undermine the security of the judgment to which a prevailing party is entitled in the event that an appellant does not succeed on appeal."<sup>51</sup>

The discretionary procedures for setting the amount of an appeal bond are tort-reform targets, but the full-amount bonding requirements have been the most vulnerable to tort reform.

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46. I use the past tense to summarize the mandatory appeal bond provisions—because of appeal-bond reform, our subject, many of these provisions were amended. Appeal-bond reform occurred in Texas after *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). See Laycock, *supra* note 27, at 502 n.92. The current Texas statute on the amount for an appeal bond mandates that a defendant post the judgment amount, the costs, and interest, but limits the aggregate amount to half of the judgment debtor's net worth or \$25 million. See TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon, Westlaw through 3d Called Sess. of the 79th Leg.).

47. See, e.g., MISS. R. APP. PROC. 8(a) (requiring a supersedeas bond to stay the lower court's judgment at 125% of the judgment amount).

48. See *supra* notes 46-47 and accompanying text.

49. *Tauber v. Commonwealth ex rel. Kilgore*, 562 S.E.2d 118, 131-32 (2002), *cert. denied*, 537 U.S. 1002 (2002). An indigent Virginia judgment debtor is exempted from the security requirement. VA. CODE ANN. § 8.01-676.1(N) (2000).

50. *Tauber*, 562 S.E.2d at 132. The plaintiff's remedy in the circuit court below was a constructive trust; on appeal, the Supreme Court increased the amount. *Id.* at 132-33. A Virginia appellate court may increase or decrease security. See VA. CODE ANN. § 8.01-676.1(E) (2000).

51. *Tauber*, 562 S.E.2d at 132-33.

C. *Why does the appeal bond need reformed?*

One significant development has drawn the appeal bond out of the courthouse's quotidian world and thrust it into the political spotlight: huge verdicts for punitive damages perforce dictate huge appeal bonds. For example, in two of Exxon's appeals from the jury's \$5 billion punitive damages verdict stemming from the Exxon-Valdez's massive oil spill in Prince William Sound, it posted security of \$6,750,000,000 and \$4,806,000,000.<sup>52</sup>

A large appeal bond costs a defendant large money. The cost of an appeal bond on a multi-billion verdict may be staggering, even for a large corporation. A professor "shopping" for an appeal bond,<sup>53</sup> learned that, for a common-garden appeal, the bond surety will charge the defendant three percent of the face amount of the bond.<sup>54</sup> The bond surety will require the defendant to supply cash collateral, an irrevocable letter of credit that will remain safe in the defendant's bankruptcy.

What about the "Big One"? For an appeal bond in the tens of millions, hundreds of millions, or billions of dollars amounts that this article discusses, the surety will also be talking about lack of capacity, multiple sureties, banks, and reinsurers. This will be likely to elicit yet another howl of pain from the judgment debtor, already wounded by the jury's verdict.

Many large jury verdicts occur in medical malpractice, patent, antitrust, and high-profile business litigation.<sup>55</sup> In the last few years, as I will discuss below, many large verdicts have been for smokers, or their estates, against tobacco companies. Most of the large recent verdicts this article focuses on have included a copious dollop of punitive damages. Professor Sharkey observes that punitive damages are "the usual driving force in multimillion (or billion) dollar awards."<sup>56</sup>

A plaintiff's judgment for a large amount of punitive damages is,

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52. *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1050 (D. Alaska 2002) (supersedeas bond of \$6.75 billion); *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1084 (D. Alaska 2004) (supersedeas bond of \$4.806 billion). *In re Exxon-Valdez*, 2006 WL 3755189.

53. Appeal bonds are available from a variety of sources. See, e.g., Appealbond.com, <http://www.appealbond.com> (last visited Aug. 20, 2006).

54. *But see* the following cases containing judicial estimates of one percent: *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986) ("which (we surmise) is 1 percent"); *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986); *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986).

55. Pamela A. MacLean, *Securities Class Action Trials on the Rise*, NAT'L L.J., Aug. 8, 2005, at A1, 16.

56. Catherine Sharkey, *Unintended Consequences of Medical Malpractice Caps*, 80 N.Y.U. L. REV. 391, 393 (2005).

however, vulnerable to post-verdict reduction or reversal if the consequent huge appeal bond does not prevent or seriously hinder an appeal. The first jury verdict against Merck for a wrongful death involving Vioxx, for example, was for \$253.4 million, which included \$229 million in punitive damages.<sup>57</sup> Merck planned to appeal. First, a Texas state statute that caps a plaintiff's punitive damages award at double her "economic" damages would reduce the punitive damages to \$1.6 million and the total judgment to \$26.1 million. Second, the reduced award would be subject to further reduction by the trial judge and on appeal.<sup>58</sup>

Large punitive damages verdicts are particularly susceptible to reduction under the Supreme Court's specialized post-verdict due-process review.<sup>59</sup> In particular, in 1996, the Court in *BMW v. Gore* established guideposts for a court to use to evaluate whether punitive damages are excessive enough to violate the Due Process Clause: the defendant's reprehensibility, the ratio of punitive damages to compensatory damages, and the civil penalty for the defendant's misconduct.<sup>60</sup> Then in *State Farm v. Campbell* in 2003, the Court suggested that a 9/1 ratio of punitive damages to compensatory damages was the limit except in rare cases.<sup>61</sup>

The Supreme Court's *Gore* and *Campbell* decisions also illustrate a transition in litigation leading to punitive damages. From punitive damages as a judicial sanction to punish an individual defendant's interpersonal vile behavior, common-law courts have fashioned punitive damages as an adjunct of consumer protection, a way for a court to punish a business for predatory behavior.<sup>62</sup> In *Gore*, a consumer sued a business claiming that its product was deceptively marketed;<sup>63</sup> in *Campbell*, consumers sued their insurance company for "bad faith" tactics.<sup>64</sup> Punitive damages, in order to punish a malefactor, should

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57. Marc Kaufman, *Texas Jury Finds Merck Liable in Vioxx Death*, WASH. POST, Aug. 20, 2005, at A1.

58. *Id.*

59. *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

60. *Gore*, 517 U.S. at 574-75.

61. *Campbell*, 538 U.S. at 425.

62. See generally Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (describing the development of exemplary damage theory and proposing a modern approach).

63. *Gore*, 517 U.S. at 563-64. Specifically, the defendant failed to advise its dealers and customers of damage and repainting that occurred prior to delivery at the dealerships. *Id.*

64. *Campbell*, 538 U.S. at 413-14 (noting that the insurance company contested liability without cause to do so).



sting—it takes big money to hurt a big business. Consumer-protection punitive damages raise a host of issues that I will summarize with one word: “excessiveness.”<sup>65</sup> The Supreme Court’s *Gore* and *Campbell* decisions also show judicial tort reform of consumer-protection punitive damages. The Court developed post-verdict judicial review based in the Due Process Clause as a principle of confinement to prevent excessiveness as abuse of punitive damages.

My skeptical view of the wisdom and workability of the Court’s Due-Process “guideposts” should be apparent to a reader of the punitive damages parts of my Remedies casebook.<sup>66</sup> Augmented post-verdict judicial review of punitive damages is, however, The Law that a pragmatist must learn to live with.<sup>67</sup>

#### *D. The Judgment Debtor’s Strategies—Federal Injunction and Bankruptcy*

If the judgment debtor-defendant is unable to post an appeal bond and not willing to appeal without one, the plaintiff’s punitive damages verdict and judgment may evade appellate review. In short, while analysts, stock market speculators, short sellers, creditors, and the investing public watch TortCo, its solvency may hang in the balance as it negotiates a generous settlement with Victor. The difficulty Texaco faced in the 1980s after Pennzoil’s Texas jury verdict for \$10.53 billion resembles TortCo’s plight.

In *Pennzoil v. Texaco*, plaintiff sued defendant in Houston, Texas. The locale and forum comported with plaintiff’s tactics for three reasons: (1) a Houston jury would be disposed to accept Pennzoil’s argument for a contract—that “a deal’s a deal;” (2) the jury would then award Pennzoil a large verdict for damages; (3) Texas procedure required the defendant to post a liquid appeal bond equal to the judgment.<sup>68</sup> The jury, vindicating Pennzoil’s tactics, accepted Pennzoil’s argument by awarding Pennzoil a \$10.53 billion verdict, \$3 billion of which was punitive damages.

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65. DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 151-55 (7<sup>th</sup> Ed. 2006) [hereinafter RENDLEMAN, REMEDIES].

66. *Id.* at 122-60l. See also Ron Krotoszynski, *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 974-86, 1017-19 (2006).

67. See Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019 (2006).

68. KEVIN DELANEY, STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE 156-158 (1992).

In the debates on the appeal bond cap in Nevada, State Senator James related the severe effects of Texaco's inability to post a bond:

I worked for Baker Botts Limited Liability Partnership, in Houston, and we represented Pennzoil-Quaker State Company. After we admitted the case, it was \$12 billion from the jury, \$3.5 billion, after it was admitted it was the largest civil judgment in history. We all went across the country recording liens on Texaco property in every state. They were not able to get a bond and filed a bankruptcy petition because of the supersedes [sic] bond, which is why they ended taking Texaco through bankruptcy. I have personal experience with what happens. It is an unforgiving requirement. . . . [T]here is no exception in the law. If you cannot post a bond, you are finished and cannot appeal.<sup>69</sup>

As will be demonstrated, two important strategies of the judgment-debtor that is seeking to avoid posting a huge appeal bond—seeking a federal court injunction and filing for bankruptcy protection—will either be legally unavailable or unappealing.

### 1. Federal Injunction

Texaco's first strategy was to seek a federal injunction. Arguing that Texas's mandatory, full-amount appeal bond effectively prevented it from appealing in violation of the Due Process Clause of the Fourteenth Amendment, Texaco sought the shelter of a federal injunction against the Texas proceeding.<sup>70</sup>

Eventually, in a diffuse decision, the United States Supreme Court declined Texaco's invitation to the federal court to enjoin the Texas state litigation.<sup>71</sup> Although three justices maintained that Texaco had no claim on the merits, the Court's basic holding was that *Younger* abstention barred Texaco's injunction action: a federal judge, the Court held, should not grant a state-court civil defendant a federal injunction to bar ongoing state litigation, even unconstitutional state litigation, when the federal plaintiff could secure adequate constitutional review in the

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69. *Revising Provisions Concerning Stay of Execution and Appeal of Certain Judgments: Hearing Before the Judiciary Comm. on Assembly Bill 576*, 71st Session (2001) [hereinafter *Nevada Testimony*] (statement of Sen. James, Chairman, Judiciary Comm.), available at <http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/1252.html> (last viewed Sept. 5, 2006).

70. In a little more detail, Texaco argued that the Texas full-amount appeal bond denied it an appeal and due process, because, even though it could afford to pay the judgment, it nevertheless could not afford to post the bond. Laycock, *supra* note 27, at 502, 511-16.

71. *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 9 (1987).

state court system.<sup>72</sup>

If TortCo or another contemporary punitive-damages defendant were to seek shelter from a state's full-amount appeal bond under the umbrella of a federal injunction, the Supreme Court's decision against Texaco's request is precedent for the tort plaintiffs.<sup>73</sup>

After the federal courts declined to assist Texaco, the Houston jury's verdict and judgment were affirmed on direct appeal in Texas.<sup>74</sup>

## 2. Bankruptcy

Texaco's second tactic was to file for bankruptcy. Eventually Texaco, still solvent, but with Pennzoil's unpaid judgment hanging over its corporate head, filed a Chapter 11, corporate-reorganization, bankruptcy. The bankruptcy court's automatic stay barred the judgment creditor's efforts to collect.<sup>75</sup> The automatic stay served Texaco as the practical equivalent of an appeal bond.<sup>76</sup> In the shadow of the bankruptcy court's automatic stay, Texaco and Pennzoil settled for about 20% of the jury verdict while Texaco paid its other creditors in full.<sup>77</sup>

Today, however, a Chapter 11 bankruptcy may not be available to a solvent corporation seeking to use the automatic stay to delay a judgment creditor's efforts to collect a judgment. For example, a solvent antitrust defendant, seeking to improve its negotiating position with the

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72. *Pennzoil Co.*, 481 U.S. at 10; Laycock, *supra* note 27, at 501 n.90, 516. *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), decided by a federal court of appeals before the Court decided *Texaco v. Pennzoil*, is not precedent to the contrary. The federal plaintiffs were civil rights organizations and active members. *Henry*, 595 F.2d at 295. The federal court of appeals rejected defendants' abstention arguments and affirmed a federal preliminary injunction that barred state-court plaintiffs' collection of an unbonded damages judgment from the federal plaintiffs. *Id.* at 307. The court of appeals hinged the *Henry* decision on the federal plaintiffs' free-speech rights, not on due process; moreover, *Henry* was a civil-rights era decision that a federal court would probably not decide the same way today. *Id.*; cf. Laycock, *supra* note 27, at 516, 521-22.

73. Laycock, *supra* note 27, at 520 (*Pennzoil* was an "easy" abstention case).

74. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), (suggesting remittitur of \$2 billion punitive damages because excessive writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988). The Pennzoil litigation also had an ironic role in tort reform.

Both sides pretty much agree on one thing in the Texas tort reform battles: That the catalyst for the sea change goes by the name of Joe Jamail. Specifically, it was the glad-handing, back-slapping bragging by the famed Houston trial lawyer as he was filmed for a 1987 CBS 60 Minutes investigation of the money pumped into elections for the state supreme court. Jamail had by then donated hundreds of thousands of dollars to state supreme court candidates over the years, and he also had recently seen his \$10.5 billion victory for Pennzoil over Texaco upheld by the high court—without so much as a hearing.

Terry Carter, *Tort Reform: Texas Style*, ABA JOURNAL, October 2006, at 34.

75. 11 U.S.C. § 362.

76. Laycock, *supra* note 27, at 504.

77. DELANEY, *supra* note 68, at Ch. 5; Laycock, *supra* note 27, at 528-29.

antitrust plaintiffs, filed bankruptcy where the automatic stay would stymie the plaintiffs' collection efforts. Then it submitted a Chapter 11 plan that was unfavorable to the judgment creditor. The court of appeals said that a defendant in litigation cannot file bankruptcy for tactical litigation advantage, but instead a Chapter 11 debtor must have a valid reorganization purpose. The court dismissed the antitrust defendant's Chapter 11 filing as not in good faith.<sup>78</sup>

Even when it is available to a judgment debtor, bankruptcy is an odious alternative. Bankruptcy is cumbersome and inconvenient, at best, because of its expense and because, even as a Chapter 11 debtor in possession, a company in bankruptcy loses a large measure of control. Congress's (ill-advised) 2005 amendments to the bankruptcy statutes do not affect the preceding points.

#### *E. The Defendant's Dilemma*

Where do the developments summarized above leave a defendant like TortCo that is looking at the business end of a huge damages verdict? While TortCo pursues reduction of Victor's \$250 million verdict on appeal, TortCo may lose many other money judgments to other plaintiffs injured by its Gizmos. If TortCo or its insurer doesn't pay, the judgment creditors will collect out of TortCo's assets.

If TortCo appeals from Victor's judgment without filing an appeal bond, Victor may collect from TortCo's assets while its appeal is pending. A federal judge will deny TortCo an anti-collection injunction. If neither a federal injunction nor an automatic stay in bankruptcy is available after the huge jury verdict, the defendant faces the practical precondition of posting an appeal bond before seeking appellate review.

TortCo may have to face the music. Neither constitutions nor statutes say that a tortfeasor corporation can continue to conduct business unaffected by large judgments against it. Even if it were a debtor in bankruptcy, TortCo would have to file a plan that comes to terms with its creditors. Many tortfeasor-businesses have suffered the consequences of tort judgments and other debts that they cannot pay—insolvency and dismemberment in or out of bankruptcy.<sup>79</sup>

But TortCo maintains that the jury's huge verdict is vulnerable to elimination or reduction on appellate review. Posting the bond may be a barrier to its appeal.<sup>80</sup>

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78. *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999).

79. *Cf. Laycock*, *supra* note 27, at 527.

80. An expensive supersedeas bond for an appeal also affects defendant's ability to appeal an

To ameliorate the asperities of appellants' bond premiums and to facilitate appellate review of large judgments, tort reformers placed appeal bond caps on their legislative agenda for state legislatures.<sup>81</sup>

### III. THE FIRST WAVE

Part III of this article reveals how the first wave of appeal-bond tort reform originated in the "tobacco" states, largely in response to huge punitive damages in a jury award in smokers' litigation in Florida. In this first wave, state legislators in a handful of "tobacco" states set caps on the punitive damages component of an appeal bond. Recall that, before this tort reform, a judge would set an appeal bond either (1) by starting with a presumption that the appeal bond should equal the amount of the plaintiff's judgment, but with a discretionary authority to reduce the bond or change the form of security for good cause; or (2) by carrying out the mandatory requirement to set a bond at least equal to the amount of the plaintiff's judgment. The first wave of appeal-bond tort reform provided relief to a judgment debtor by limiting the amount of an appeal bond that could be required for the punitive damages part of the award.

A \$164 billion appeal bond in a smokers' class action case, *Engle v. R.J. Reynolds Tobacco*,<sup>82</sup> ushered in the first wave of appeal-bond cap legislation. The *Engle* litigation was only one in a series of tobacco litigation cases in which the cracks in the "tobacco wins/smokers lose" paradigm of the 1990s became apparent. As will be illustrated, in a number of cases, tobacco began to lose and smokers to win—at least at the trial court level. But those trial court tobacco losses translated into huge, sometimes devastating, punitive awards. The huge punitive awards, in turn led to huge appeal bonds.

#### *A. The One Hundred and Sixty-Four Billion Dollar Question*

To be specific, several "tobacco" states enacted, in this first wave of legislation, appeal-bond-capping statutes in a direct reaction to the plaintiffs' \$145 billion punitive damages verdict in 2000 in *Engle*, which

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injunction. See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment?: A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 431 (1999).

81. Mike Ballard, *17-Front Tort War*, NAT'L L.J., May 12, 2003, at A1. I hope that a reader of my casebook will conclude that my views on tort reform generally are evenhanded with an eye to presenting a balanced picture of a complex phenomena. See RENDELMAN, REMEDIES, *supra* note 65, at 178-216.

82. *Engle v. R.J. Reynolds Tobacco*, No. 94-08273 CA-22, 2000 WL 33534572, (Fla. Cir. Ct. Nov. 6, 2000).

translated into a \$164 billion appeal bond.<sup>83</sup> The lawsuits this article discusses are, like *Engle*, The Big Ones—exceptional, high-profile, high-stakes, complex, and protracted. The verdicts and appellate court decisions are often large enough to be stock market hits and reported in the media.

## B. Southern Hospitality

### 1. Tobacco Litigation—In the 1990s and Today

The political economy of tobacco litigation in 2006 differs from the late 1990s, the last time I looked.<sup>84</sup> The paradigm in the late 1990s was “tobacco wins/smokers lose.”<sup>85</sup> The tobacco companies defended smokers’ lawsuits vigorously. No smoker-plaintiff had ever collected from a tobacco company. Cracks were visible, but the paradigm was still intact.

In 2006, “smokers lose” is no longer always true. Large jury verdicts for smokers’ and their families have been entered; appellate courts have affirmed a few, reduced and reversed others.<sup>86</sup> Ms. Guardino and Professor Daynard wrote that the tobacco companies have paid four smokers verdicts.<sup>87</sup>

Some recent highlights of smokers’ litigation will show the shifts in smokers’ litigation, as well as the defendants’ scorched-earth litigation tactics, including multiple and tortuous appeals. Many juries have been outraged enough at the defendants’ misconduct to return huge punitive

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83. See *R.J. Reynolds Tobacco*, 2000 WL 33534572, at \*32-33 (itemizing damages); Craig Timberg, *Verdict Leaves Va. Capital Uneasy About the Future of Tobacco*, WASH. POST, July 20, 2000, at B2. See generally, Finch, *supra* note 27, at 497-500 (discussing the *Engle* decision, with successive action by state attorneys general and legislative enactments in states including Georgia, Kentucky, North Carolina, and Virginia).

84. See generally, Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?* 33 GA. L. REV. 847 (1999) [hereinafter Rendleman, *Common Law Restitution*].

85. Sara Guardino & Richard Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single-Digit Ratio Between Punitive and Compensatory Damages*, 67 U. PITT. L. REV. 1, 37-65 (2005). See John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOYOLA L.A. L. REV. 1021, 1043-47 (2005), for a short summary of tobacco litigation.

86. *But see* *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St. 3d 5, 12-13 (2006) (reversing appellate class certification for a class of consumers alleging that tobacco advertising was misleading, on the grounds that the tobacco company was not on notice that its practices could be declared deceptive); *Price v. Philip Morris*, 848 N.E.2d 1 (Ill. 2005), *reh’g denied*, 846 N.E.2d 597 (Ill. 2006) (same).

87. Guardino & Daynard, *supra* note 85, at 37 n.284.

damages verdicts. Smokers' tobacco litigation is, however, far from a "smoker-wins" paradigm. The tobacco companies continue to defend each case zealously, including appealing up and down the appellate ladder. These appeals are the stage where this article's subjects, the appeal bond and caps, play their roles, facilitating defendants' appeals.

## 2. The Importance of Seeing Engle

As noted at the beginning of Part III, the verdict in the *Engle* litigation led to legislative appeal bond caps in several "tobacco" states. In *Engle*, plaintiffs in a smokers' class action had received a \$145 billion punitive award. The Florida trial judge upheld the jury verdict in November 2000.<sup>88</sup> In the absence of a Florida appeal-bond cap, the tobacco companies would have needed to post a \$164 billion Florida appeal bond to stay plaintiff's execution pending their appeal.<sup>89</sup> The Florida legislature's amendment to the state appeal-bond provided some relief.<sup>90</sup>

The defendants were terrified, however, that the *Engle* plaintiffs might collect the \$145 billion Florida judgment from their assets in Virginia and other tobacco states, courtesy of the Full Faith and Credit Clause of the United States Constitution. Thus, the move to other "tobacco" states to seek similar appeal bond cap relief.

### a. Virginia

Virginia, another "tobacco" state soon followed suit. Virginia is the third top tobacco-growing state. For almost 400 years, Virginia's rural economy has been rooted in tobacco. The ceiling of the Senate Chamber in the state capitol in Richmond is ringed with sculpted wreaths of tobacco leaves. Richmond is the headquarters of Philip Morris, whose Richmond factory south of the state capitol produces 700,000,000 cigarettes each day. Philip Morris, an *Engle* defendant, was used to having its way in Richmond.

In 2000, accompanied by an abundance of political hoop-la and intense lobbying by Virginia-based *Engle* defendants, the Virginia

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88. *R.J. Reynolds Tobacco*, 2000 WL 33534572, at \*31; James Grimaldi, *Florida Decision Hurts Deal on Tobacco Suits; 2 Firms Offered \$8 Billion to Settle Nationwide Claims and Limit Jury Verdicts*, WASH. POST, Nov. 7, 2000, at A8.

89. FLA. R. APP. P. 9.310(b)(1) (amended by 2000 Fla. Sess. Law Serv. ch. 00-128); Mark Gottlieb & Richard Daynard, *Will Big Tobacco Seek Bankruptcy Protection?: A \$145 Billion Verdict Poses the Question*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 359, 361 (2001).

90. FLA. STAT. ANN. § 768.733 (West, Westlaw through Nov. 7, 2006 Gen. Election).

General Assembly joined Florida and several other “tobacco” states in (1) amending their versions of the Uniform Enforcement of Foreign Judgments Acts, (UEFJA); and (2) adding caps to their appeal bond statutes. The proponents’ pitch to the Virginia General Assembly focused on the potential catastrophic effect of the \$145 billion *Engle* judgment on Philip Morris.

Labeling the amendments emergency legislation to take effect immediately when signed by the governor, Virginia’s General Assembly amended and re-enacted the two code sections.<sup>91</sup> The Virginia legislation capped a defendant-judgment debtor’s appeal bond for a civil judgment for non-compensatory (meaning punitive) damages at \$25 million. The statute included an exception to the cap: an appellant that is denuding itself of assets must post a bond in the full amount of the judgment.<sup>92</sup>

The presumed urgent need to protect those defendants’ assets in Virginia and other states by amending the states’ UEFJA will be examined below. That this appeal-bond cap was important enough to the Commonwealth to qualify for passage as “emergency” legislation is difficult to sustain on any practical or substantive ground. Hyperbole, forceful lobbying, and economic power explained this addition to Virginia’s code far better than sound public policy.

#### b. Other Tobacco States

Four other “tobacco” states’ legislatures passed appeal-bond capping statutes. North Carolina went Virginia’s emergency legislation one better. Governor Hunt called the Tar Heels’ Solons into a special session; the legislature passed the cap by votes of 48-2 and 115-1 along with a resolution “urging the cigarette giants to purchase more North Carolina tobacco as a show of gratitude for the bond cap.”<sup>93</sup> The other three statutes were virtually identical to Virginia’s.<sup>94</sup> Florida’s cap differed a little in wording: it referred to “punitive damages” and it capped a defendant-appellant’s bond at “\$100 million.”<sup>95</sup>

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91. VA. CODE ANN. §§ 8.01-465.4, 8.01-676.1 (2000 & Supp. 2005).

92. VA. CODE ANN. § 8.01-676.1(J), (K) (West, Westlaw through 2006 Sp. Sess. I).

93. Eric Dyer and Kerry Hall, *N.C. Approves Tobacco Protection Bill North Carolina is the Fourth State to Enact a Shield for Tobacco Companies Facing Major Lawsuits*, GREENSBORO NEWS & RECORD, April 6, 2000, at A1; see also Matthew Eisley and Bob Williams, *Shield Tobacco Companies Seek May Crumble on Appeal*, RALEIGH NEWS & OBSERVER, March 28, 2000, at A1.

94. See GA. CODE ANN. § 5-6-46 (2000), amended by Laws 2004, Art. 778, § 1, and by Laws 2005, Art. 19, § 5; KY. REV. STAT. ANN. §§ 411.187, 426.965 (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.); N.C. GEN. STAT. ANN. §§ 1C-1750, 1C-1760, 1-289 (repealed 2003).

95. FLA. ST. ANN. §768.733 (2000). Finch, *supra* note 27 (discussing “first wave” statutes).



c. Why Were Legislative Appeal-Bond Caps Deemed Necessary?

Appeal-bond cap legislation mattered to judgment debtors, particularly those facing gigantic punitive damage awards, for a number of pragmatic reasons, which will be detailed below. Perhaps less obviously, the legislation also aided state governments that were receiving payments under the Master Settlement Agreement that had resolved previous Medicaid-recovery litigation against tobacco defendants.

A large verdict that never ripens into a collectable judgment requires the defendant, as a practical matter, to post an appeal bond for its appeal. While a defendant's appeals are pending, a capped bond gives the judgment debtor time and financial quiescence. It reduces a judgment creditor's settlement leverage and strategic advantage. An observer may expect a calming effect on the defendant's stock prices, creditors, suppliers, employees, and customers. The tobacco-states' appeal-bond capping statutes for a punitive damages judgment are the first stage of the development in tort reform examined here.

As an immediate and practical matter, the Florida appeal-bond cap relieved the pressure on the *Engle* defendants in Florida. Their appeal to the Florida district court of appeal proceeded. In preparing for the Florida state direct appeals, three of the *Engle* defendants agreed to make an unconditional payment of more than \$700 million to the plaintiffs. These defendants sought to avoid the possibility that the plaintiffs' equal-protection constitutional challenge to the Florida bond-cap legislation would succeed and that they would be required to post a bond.<sup>96</sup>

The defendants might have saved their money for more precipitation on a future day. First, the Florida bond cap and the others were probably constitutional, as we will discuss below. Second, the Florida District Court of Appeal reversed the *Engle* jury's \$145 billion verdict in May, 2003. Among other things, that court's decision decertified the plaintiff class.<sup>97</sup> The Florida intermediate appellate court's reversal eliminated, for the near future, the original impetus for the tobacco states' first wave of bond-capping legislation. In December of 2006, the Florida Supreme Court affirmed most of the intermediate

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96. Mark Kaufman, *Tobacco Firms to Pay \$700 Million: Agreement Made to Avoid Posting Huge Bond in Fla. Suit*, WASH. POST, May 8, 2001, at A1.

97. *Liggett Group Inc. v. Engle*, 853 So.2d 434, 450 (Fla. Dist. Ct. App. 2003), *approved in part, quashed in part, Engle*, 2006 WL 3742610.

appellate court's decision.<sup>98</sup> Like the intermediate appellate court's decision, the Florida Supreme Court's result leaves the plaintiffs with little hope of resurrecting that particular smokers' class action and cause of action.

Even without the *Engle* jury's \$145 billion punitive damages judgment, financial pressures on the tobacco companies from their \$10 billion yearly payout under the MSA settlement with the state attorneys general and a rising tide of individual and perhaps class-action products-liability verdicts may eventually force one or more tobacco companies to file for bankruptcy reorganization or liquidation.<sup>99</sup>

Indeed, commentators have suggested that state governments' officials supported appeal-bond capping statutes to protect their streams of payments from tobacco companies under the Master Settlement Agreement, (MSA), the states' earlier settlements of their attorneys generals' Medicaid-recovery litigation. A state government's interest in continuing to receive its MSA settlement payout aligned its interest with the tobacco companies' goal of avoiding bankruptcy.<sup>100</sup>

Data about the United States' public-private civil justice system of blame and claim is hard to come by. Litigation takes a long time. Many of the results fly below a professor's radar; a researcher may never discover a private settlement without a lawsuit or a confidential settlement of a filed lawsuit. Many of the jury verdicts that the press reports never become judgments because of judicial review and settlements. Social science takes time. Recent events like the Supreme Court's punitive damages decision in 2003 are not reflected in the literature.<sup>101</sup>

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98. *Engle*, 2006 WL 3742610. The complex and divided supreme court decision holds, contrary to the plaintiffs, that the trial judge erred by certifying a plaintiff class for punitive damages; the Supreme Court decertified the plaintiff class for the third phase of the litigation because it centered on legal causation, comparative fault, and damages; the court also held that the trial judge erred by deciding plaintiffs' punitive damages before their compensatory damages; finally, the court held that the plaintiffs' punitive damages were constitutionally excessive. *Id.* at \*8-11, 13. In parts of its decision, the court also, however, favored the plaintiff side. For example, it approved the jury's liability findings against the tobacco defendants and held that individual smokers' actions against tobacco defendants would be appropriate, including the benefit of res judicata for plaintiff to bar a defendant from relitigating those liability issues. *Id.* at \*22.

99. Gottlieb & Daynard, *supra* note 89, at 364-65.

100. Finch, *supra* note 27, at 499-500; Gottlieb & Daynard, *supra* note 89, at 361-62.

101. The most recent data in a study of punitive damages published in 2006 was 2001. See Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEG. ST. 263 (2006).

### 3. The Price is Wrong

As important as *Engle* has been in framing the appeal-bond tort reform issue, other “Big Ones” provide continuing support for the tort-reform effort to facilitate appeals by judgment debtors facing huge appeal bonds. Further, the results of ultimate appeals show that these judgment debtors frequently have substantial partial success or even complete success before appellate tribunals.

In the *Schwartz* litigation in Oregon, the jury verdict for the smoker’s estate included \$150 million of punitive damages.<sup>102</sup> The trial judge reduced the punitive damages to \$100 million, but the Oregon intermediate appellate court reversed for a new trial on the amount of punitive damages because the trial judge failed to confine the jury to considering defendant’s in-state misconduct.<sup>103</sup>

In *Bullock v. Philip Morris*, the smoker’s family won a jury verdict for \$650,000 in compensatory damages, plus \$28 billion punitive damages; the trial judge remitted plaintiffs’ punitive damages to \$28 million.<sup>104</sup> The court of appeals held that, despite the 33/1 ratio of punitive damages to compensatory damages, \$28 million in punitive damages was not excessive in light of the defendant’s misconduct and its vast “scale and profitability.”<sup>105</sup>

In *Boeken v. Philip Morris*, the jury’s verdict included \$3 billion punitive damages, which the trial judge remitted to \$100 million and the court of appeals to \$50 million.<sup>106</sup> The California Supreme Court refused to review, and the United States Supreme Court denied certiorari.<sup>107</sup>

In *Williams v. Philip Morris*, the jury thought that the defendant’s misconduct warranted \$79.5 million punitive damages; the trial judge remitted that to \$32 million, and the state court of appeals reinstated the jury’s \$79.5.<sup>108</sup> The United States Supreme Court remanded for reconsideration in light of *State Farm v. Campbell*, but the state intermediate court of appeals and state Supreme Court persisted in their

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102. Estate of Schwarz v. Philip Morris, Inc., 135 P.3d 409, 414 (Or. Ct. App. 2006).

103. *Id.* at 439-40.

104. Bullock v. Philip Morris USA Inc., 42 Cal. Rptr. 3d 140, 179 (Cal. Ct. App. 2006); \$28 Billion Award Cut, NAT’L L.J., Dec. 23, 2002, at A6. See also David Hechler, *Billions and Billions: Tobacco Takes It on the Chin*, NAT’L L.J., Feb. 3, 2003, at A1.

105. *Bullock*, 42 Cal. Rptr. 3d at 179.

106. Boeken v. Philip Morris, 26 Cal. Rptr. 3d 638, 645-646 (Cal. Ct. App. 2005), *cert. denied*, 126 S.Ct. 1567 (2006).

107. *Id.*

108. Williams v. Philip Morris Inc., 127 P.3d 1165, 1182 (Or. 2006).

decision that \$79.5 million was not excessive.<sup>109</sup> The defendant filed for certiorari on March 30, 2006, and the Supreme Court granted review on May 30.<sup>110</sup> We will be hearing more about *Williams* in 2007.

In addition to the reductions in damages, the tobacco defendants have enjoyed some outright success on appeals that are facilitated by the appeal-bond cap legislation. The Georgia Supreme Court, for example, held that State participation in the MSA settled an individual smoker's punitive damages.<sup>111</sup>

In Illinois in *Price v. Philip Morris*, the defendant also achieved complete success. In *Price v. Philip Morris*, a smokers' class action, the trial judge awarded the class \$10.1 billion damages, \$3 billion of it punitive damages. The judge found that Philip Morris had deceived the plaintiffs that "light" and "low tar" cigarettes were safer than "regular" ones.

In March 2003, after the judge ordered Philip Morris USA to pay \$10.1 billion, the company argued that a \$12 billion appeal bond would bankrupt it.<sup>112</sup> The trial judge reduced the bond to \$6.8 billion to facilitate the company's appeal. In July, 2003, lawyers argued the propriety of this reduction before an Illinois intermediate appellate court.<sup>113</sup> That court nixed the reduced bond. The Illinois Supreme Court, however, reinstated the reduced bond.<sup>114</sup>

On Philip Morris's rare direct appeal, leapfrogging the state's intermediate appellate court, the Illinois Supreme Court reversed the verdict.<sup>115</sup> The Supreme Court's principal opinion, after expressing "grave reservations" about the trial judge's plaintiff-class certification, reversed on the merits—the defendant's use of United States-approved terms "light" and "low tar" meant that it had not violated the consumer

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109. *Id.* The Supreme Court granted certiorari on May 30, 2006. *Philip Morris USA v. Williams*, 126 S.Ct. 2329 (2006). Professor Hines told us that this was going to happen and why. See Laura Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't be the Last Word*, 37 AKRON L. REV. 779 (2004).

110. *Philip Morris USA v. Williams*, 126 S.Ct. 2329 (2006).

111. *Brown & Williamson v. Gault*, 627 S.E.2d 549 (Ga. 2006). However, in *Engle v. Liggett Group, Inc.*, 2006 WL 3742610, at \*7, the Florida Supreme Court, citing the Exxon-Valdez litigation, rejected the defendants' argument that the state of Florida's MSA-FSA settlement settled state smokers' punitive damages claims.

112. *Bond Worry Trips Altria*, RICHMOND TIMES-DISPATCH, July 10, 2003, at C1.

113. *Id.*

114. *Price v. Philip Morris*, 848 N.E.2d 1 (Ill. 2005), *reh'g denied*, 846 N.E.2d 597 (Ill. 2006) (writing the principal decision for the Illinois Supreme Court was Justice Rita Garman, a law school classmate of the author).

115. *Id.*

fraud and deceptive practices statutes.<sup>116</sup>

The developments summarized above set the stage for the further codified reforms that followed in the second wave of appeal-bond capping legislation.

#### IV. THE SECOND WAVE

In the second wave of appeal-bond tort reform legislation, the appeal-bond cap went national. This second-wave development included (1) the widespread adoption of the appeal bond caps in states other than the “tobacco” states; and (2) the expansion of areas of coverage under the statutes.

Between 2000 and 2005, in the second stage of my topic’s development, the “general” appeal-bond cap flourished as one of the tort reform movement’s agenda items. The states’ second-wave appeal-bond caps, moreover, differ on the type of damages capped, the amount of the cap, and the type of defendant protected. Further, more than half of the states’ legislatures enacted appeal bond caps.<sup>117</sup> Chalk one up for tort

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116. *Id.*; Christina Cheddar Berk, *Illinois High Court Takes Altria Appeal*, WALL ST. J., Sept. 17, 2003, at A23.

117. ARK. CODE ANN. § 16-55-214(a) (West, Westlaw, through 2006 1st Ex. Sess. of the 85th Gen. Assem. and Nov. 2006 Gen. Election); CAL. HEALTH & SAFETY CODE § 104558(a) (West, Westlaw through 2006 legislation); COLO. REV. STAT. ANN. § 13-16-125(1) (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.); FLA. STAT. ANN. § 768.733(2) (West, Westlaw through Nov. 7, 2006 Gen. Election); GA. CODE ANN. § 5-6-46(b) (West, Westlaw through 2006 Reg. Sess.); IDAHO CODE ANN. § 13-202(2) (West, Westlaw through 2006 2d Reg. Sess. and 1st Ex. Sess.); IND. CODE ANN. § 34-49-5-3(a) (West, Westlaw through 2006 2d Reg. Sess. of the 114th Gen. Assem.); IOWA CODE ANN. § 625A.9(2)(b) (West, Westlaw, through 2006 Reg. Sess. and 1st Ex. Sess.); KAN. STAT. ANN. § 50-6a05(a) (West, Westlaw through 2005 Reg. Sess.); KY. REV. STAT. ANN. § 411.187(1) (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.); LA. REV. STAT. ANN. § 39:98.6 (Westlaw through 2006 1st Ex. and Reg. Sess. Acts); MICH. COMP. LAWS ANN. § 600.2607(1) (West, Westlaw through P.A. 2006, No. 1-460); MINN. STAT. ANN. § 550.36(a) (West, Westlaw through 2006 Reg. Sess.); MISS. R. APP. P. 8(b)(2)(c); MO. ANN. STAT. §§ 512.085(1), 512.099 (West, Westlaw through 2006 2d Reg. Sess. of the 93d Gen. Assem.); NEB. REV. STAT. § 25-1916(1) (Westlaw through 2006 2d Reg. Sess. 99th Leg.); NEV. REV. STAT. ANN. § 20.035(1) (West, Westlaw through 2005 73d Reg. Sess., 22d Spec. Sess., and Nov. 2006 Gen. Election); N.J. STAT. ANN. § 52:4D-13(b) (West, Westlaw through L.2006, c. 102 and J.R. No. 3); N.C. GEN. STAT. ANN. § 1-289(b) (West, Westlaw through 2006 Reg. Sess.); N.D. CENT. CODE § 28-21-25(1) (LexisNexis through 2005 Reg. Sess.); OHIO REV. CODE ANN. § 2505.09 (West, Westlaw through 2006 File 150 of the 126th Gen. Assem.); OKLA. STAT. ANN. tit. 12 § 990.4(B)(5) (West, Westlaw through 2006 2d Ex. Sess.); OR. REV. STAT. ANN. § 19.312 (West, Westlaw through 2005 Reg. Sess.); 35 PA. CONS. STAT. ANN. § 5701.309(a) (West, Westlaw through Reg. Sess. Act 2006-116 and 2005-2006 1st Spec. Sess. Act 1); S.D. CODIFIED LAWS § 15-26A-26 (Westlaw through 2006 Reg. Sess., Sup. Ct. R. 06-72, and 2006 Gen. Election); TENN. CODE ANN. § 27-1-124(a) (West, Westlaw through 2006 1st Ex. Sess. and 2d Reg. Sess.); TEX. R. APP. P. 24.2(a)(1); TEX. CIV. PRAC. & REM. CODE ANN. § 52.006( b) (Vernon, Westlaw through 2006 3d Called Sess. of the 79th Leg.); UTAH R. CIV. P. 62(j)(2); VA. CODE ANN. § 8.01-676.1(J) (West,

reform.

The second wave's genesis appears to have been in model legislation proposed by the American Legislative Exchange Council (ALEC),<sup>118</sup> a business-oriented Washington-based organization of state legislators and executives.

The tobacco companies' difficulties with bonding the *Engle* verdict were generalized to potential products-liability defendants, as well as to targets of state and local government suits including lead paint and gun manufacturers, indeed to "HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, 'Hollywood,' video game makers, and even the dairy and fast food industries."<sup>119</sup>

Smokers' tobacco litigation, thus, became an incubator for tort reform. The tobacco states' first wave of bond caps were a precedent for general appeal-bond reform. ALEC's model act may have provided a starting point for discussion. Very defendant-oriented, however, the model act caps or waives an appeal bond for any judgment above \$1 million or over \$100,000 for a local "small" business.<sup>120</sup> Further, its safety valve only applies when a judgment debtor is "dissipating" assets or moving them outside the United States.<sup>121</sup>

The second-wave of state appeal-bond cap statutes is too recent to have led to much, if any, scholarship. What characteristics and attributes do they have?

#### *A. Exception for Defendants Dissipating Assets*

To begin with, like the first-wave of statutes, generally the states' appeal-bond caps do not apply to a judgment debtor that is found to be denuding itself of assets pending appeal. That judgment debtor must post a full bond.<sup>122</sup>

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Westlaw through 2006 Spec. Sess. I); W. VA. CODE ANN. § 4-11A-4 (West, Westlaw through 2006 2d Ex. Sess.); WIS. STAT. ANN. § 808.07(2m)(a) (West, Westlaw through 2005 Act 491). If the lawsuit is in federal court in a state that has an appeal-bond cap, the defendant may be able to take advantage of the state cap. FED. R. CIV. P. 62(f). "In any state in which the judgment is a lien upon the property of the judgment debtor," it is entitled to the same stay in federal as in state court. *Id.* I found no precedent on point.

118. Mark A. Behrens & Donald J. Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 29 PROD. SAFETY & LIAB. REP. (BNA) No. 21, at 515 (2001).

119. *Id.* at 516.

120. American Legislative Exchange Council ("ALEC"), Appeal Bond Waiver Act, <http://www.alec.org/2/2/appeal-bond-waiver-act.html>.

121. *Id.*

122. See ARK. CODE ANN. § 16-55-214(b) (West, Westlaw, through 2006 1st Ex. Sess. of the 85th Gen. Assem. and Nov. 2006 Gen. Election); CAL. HEALTH & SAFETY CODE § 104558(c)

### *B. Caps Often Not Limited to Punitive Damages*

The first wave's limitation of the appeal-bond cap to punitive damages has dropped out of many second-wave statutes. For example, second-wave Virginia legislation, passed in 2004, caps a judgment debtor's appeal bond for any civil judgment for damages at \$25 million.<sup>123</sup> Other caps for all civil money judgments were passed in Arkansas, Colorado, Georgia, Michigan, South Dakota, Tennessee, and Wisconsin.<sup>124</sup>

Idaho's appeal-bond cap is \$1 million for punitive damages; in addition, the court may waive an appeal bond for good cause.<sup>125</sup>

Today Mississippi caps the judgment debtor's appeal bond for punitive damages, but the cap is \$100 million.<sup>126</sup> Kentucky's \$100

(West, Westlaw through 2006 legislation); COLO. REV. STAT. ANN. § 13-16-125(2) (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.); FLA. STAT. ANN. § 768.733(3) (West, Westlaw through Nov. 7, 2006 Gen. Election); GA. CODE ANN. § 5-6-46(f) (West, Westlaw through 2006 Reg. Sess.); IDAHO CODE ANN. § 13-202(3) (West, Westlaw through 2006 2d Reg. Sess. and 1st Ex. Sess.); IND. CODE ANN. § 34-49-5-3(b) (West, Westlaw through 2006 2d Reg. Sess. of the 114th Gen. Assem.); IOWA CODE ANN. § 625A.9(2)(b) (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.); KY. REV. STAT. ANN. § 411.187(2) (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.); LA. REV. STAT. ANN. § 39:98.6 (Westlaw through 2006 1st Ex. and Reg. Sess. Acts); MICH. COMP. LAWS ANN. § 600.2607(2) (West, Westlaw through P.A. 2006, No. 1-460); MINN. STAT. ANN. § 550.36(b) (West, Westlaw through 2006 Reg. Sess.); MISS. R. APP. P. 8(b)(4); MO. ANN. STAT. § 512.085(2) (West, Westlaw through 2006 2d Reg. Sess. of the 93d Gen. Assem.); NEB. REV. STAT. § 25-1916(1) (West, Westlaw through 2006 2d Reg. Sess. 99th Leg.); NEV. REV. STAT. § 20.035(2) (West, Westlaw through 2005 73d Reg. Sess., 22d Spec. Sess., and Nov. 2006 Gen. Election); N.J. STAT. ANN. § 52:4D-13(c) (West, Westlaw through L.2006, c. 102 and J.R. No. 3); N.C. GEN. STAT. § 1-289(c) (West, Westlaw through 2006 Reg. Sess.); N.D. CENT. CODE § 28-21-25(2) (LexisNexis through 2005 Reg. Sess.); OKLA. STAT. ANN. tit. 12 § 990.4(B)(5) (West, Westlaw through 2006 2d Ex. Sess.); 35 PA. CONS. STAT. ANN. § 5701.309(b) (West, Westlaw through Reg. Sess. Act 2006-116 and 2005-2006 1st Spec. Sess. Act 1); S.D. CODIFIED LAWS § 15-26A-26 (Westlaw through 2006 Reg. Sess., Sup. Ct. R. 06-72, and 2006 Gen. Election); TENN. CODE ANN. § 24-1-124(b) (West, Westlaw through 2006 1st Ex. Sess. and 2d Reg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(e) (Vernon, Westlaw through 2006 3d Called Sess. of the 79th Leg.); UTAH R. CIV. P. 62(j)(4); VA. CODE ANN. § 8.01-676.1(K) (West, Westlaw through 2006 Spec. Sess. I); W. VA. CODE ANN. § 4-11A-4 (West, Westlaw through 2006 2d Ex. Sess.); WIS. STAT. ANN. § 808.07(2m)(b) (West, Westlaw through 2005 Act 491).

123. VA. CODE ANN. § 8.01-676.1(J) (West, Westlaw through 2006 Spec. Sess. I).

124. ARK. CODE ANN. § 16-55-214(a) (West, Westlaw through 2006 1st Ex. Sess. of the 85th Gen. Assem. and Nov. 2006 Gen. Election); COLO. REV. STAT. ANN. § 13-16-125(1) (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.); GA. CODE ANN. § 5-6-46(b) (West, Westlaw through 2006 Reg. Sess.); MICH. COMP. LAWS ANN. § 600.2607(1) (West, Westlaw through P.A. 2006, No. 1-460); S.D. CODIFIED LAWS § 15-26A-26 (Westlaw through 2006 Reg. Sess., Sup. Ct. R. 06-72, and 2006 Gen. Election); TENN. CODE ANN. § 27-1-124(a) (West, Westlaw through 2006 1st Ex. Sess. and 2d Reg. Sess.); WIS. STAT. § 808.07(2m)(a) (West, Westlaw through 2005 Act 491).

125. IDAHO CODE ANN. § 13-202 (West, Westlaw through 2006 2d Reg. Sess. and 1st Ex. Sess.).

126. MISS. R. APP. P. 8(b)(2)(c).

million cap is limited to punitive damages.<sup>127</sup>

### *C. The Cap Limitation*

The amounts of the second-wave caps vary from Idaho's \$1 million<sup>128</sup> to \$150 million.<sup>129</sup> The most common cap is \$25 million.<sup>130</sup> Other states' caps are \$50 million,<sup>131</sup> \$75 million,<sup>132</sup> and \$100 million.<sup>133</sup>

### *D. Protection of MSA Tobacco Companies*

Several of the second wave appeal bond caps protect the MSA tobacco companies. California's statute, for example, caps an appellant's appeal bond at \$150 million but only for a defendant covered by the Master Settlement Agreement, that is a tobacco company that

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127. KY. REV. STAT. ANN. § 411.187(1) (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.).

128. IDAHO CODE ANN. § 13-202(2) (West, Westlaw through 2006 2d Reg. Sess. and 1st Ex. Sess.2005).

129. CAL. HEALTH & SAFETY CODE § 104558(a) (West, Westlaw through 2006 legislation); MINN. STAT. ANN. § 550.36(a) (West, Westlaw through 2006 Reg. Sess.).

130. ARK. CODE ANN. § 16-55-214(a) (West, Westlaw through 2006 1st Ex. Sess. of the 85th Gen. Assem. and Nov. 2006 Gen. Election); COLO. REV. STAT. ANN. § 13-16-125(1) (West, Westlaw through 2006 1st Ex. Sess. of the 65th Gen. Assem.); GA. CODE ANN. § 5-6-46(b) (West, Westlaw through 2006 Reg. Sess.); IND. CODE ANN. § 34-49-5-3(a) (West, Westlaw through 2006 2d Reg. Sess. of the 114th Gen. Assem.); KAN. STAT. ANN. § 50-6a05(a) (West, Westlaw through 2005 Reg. Sess.); MICH. COMP. LAWS ANN. § 600.2607(1) (West, Westlaw through P.A. 2006, No. 1-460); N.C. GEN. STAT. § 1-289(b) (West, Westlaw through 2006 Reg. Sess.); N.D. CENT. CODE § 28-21-25(1) (LexisNexis through 2005 Reg. Sess.); OKLA. STAT. ANN. tit. 12 § 990.4(B)(5) (West, Westlaw through 2006 2d Ex. Sess.); S.D. CODIFIED LAWS § 15-26A-26 (Westlaw through 2006 Reg. Sess., Sup. Ct. R. 06-72, and 2006 Gen. Election); TEX. R. APP. P. 24.2(a)(1); TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (Vernon, Westlaw through 2006 3d Called Sess. of the 79th Leg.); UTAH R. CIV. P. 62(j)(2); VA. CODE ANN. § 8.01-676.1(J) (West, Westlaw through 2006 Spec. Sess. I).

131. LA. REV. STAT. ANN. § 39:98.6 (West, Westlaw through 2006 1st Ex. and Reg. Sess. Acts); MO. ANN. STAT. § 512.085(1) (West, Westlaw through 2006 2d Reg. Sess. of the 93d Gen. Assem.); NEB. REV. STAT. § 25-1916(1) (West, Westlaw through 2006 2d Reg. Sess. 99th Leg.); NEV. REV. STAT. § 20.035(1) (West, Westlaw through 2005 73d Reg. Sess., 22d Spec. Sess., and Nov. 2006 Gen. Election); N.J. STAT. ANN. § 52:4D-13(b) (West, Westlaw through L.2006, c. 102 and J.R. No. 3); OHIO REV. CODE ANN. § 2505.09 (West, Westlaw through 2006 File 150 of the 126th Gen. Assem.).

132. TENN. CODE ANN. § 27-1-124(a) (West, Westlaw through 2006 1st Ex. Sess. and 2d Reg. Sess.).

133. FLA. STAT. ANN. § 768.733(2) (West, Westlaw through Nov. 7, 2006 Gen. Election); IOWA CODE ANN. § 625A.9(2)(b) (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.); KY. REV. STAT. ANN. § 411.187(1) (West, Westlaw through 2006 Reg. Sess. and 1st Ex. Sess.); MISS. R. APP. P. 8(b)(2)(c); MO. ANN. STAT. § 512.085(1) (West, Westlaw through 2006 2d Reg. Sess. of the 93d Gen. Assem.); 35 PA. CONS. STAT. ANN. § 5701.309(a) (West, Westlaw through Reg. Sess. Act 2006-116 and 2005-2006 1st Spec. Sess. Act 1); W. VA. CODE ANN. § 4-11A-4 (West, Westlaw through 2006 2d Ex. Sess.); WIS. STAT. § 808.07(2m)(a) (West, Westlaw through 2005 Act 491).



settled the state attorney general's Medicaid reimbursement lawsuit in 1998 in return for making a stream of payments to the state.<sup>134</sup> Any other California judgment debtor-appellant must bond an appeal at either 150 or 200 percent of the amount of the judgment.<sup>135</sup> Other states' statutes that cap a MSA judgment debtor's appeal bond were passed in Kansas, Missouri, Nevada, New Jersey, Oklahoma, Pennsylvania, and South Carolina.<sup>136</sup>

The Louisiana appeal bonding legislation differs a little; it has two provisions: (1) a \$50 million cap for a MSA appellant that was found liable in civil litigation under any legal theory; and (2) the judge has discretion to set a "sufficient" bond for a judgment against any other defendant that is over \$50 million.<sup>137</sup>

### *E. Protection of Other "Favored" Defendants*

Other caps shelter only "favored" defendants. New York's cap for a medical, dental or podiatric malpractice defendant is \$1 million or the judgment debtor's insurance policy coverage limit.<sup>138</sup>

This second wave of appeal-bond caps, then, witnessed the movement of the caps from a handful of "tobacco" states to more than half the states. At the same time, the appeal-bond cap changed in amount and nature. Legislatures varied the amount of the cap, with one state enacting a \$1 million cap; they often applied the cap to the compensatory as well as the punitive part of the award; and they sometimes provided additional protections for "favored" defendants.

## V. IN THE LEGISLATURE

A tortfeasor like TortCo that a jury has found liable for a multi-million dollar punitive damages judgment has a hard row to hoe in a legislature. Its status as an out-of-state corporation adds to its woe. "A

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134. CAL. HEALTH & SAFETY CODE § 104558(a) (West, Westlaw through 2006 legislation).

135. CAL. CIV. PROC. CODE § 917.1(b) (West, Westlaw through all 2006 laws and all propositions appearing on the Nov. 7, 2006 ballot).

136. KAN. STAT. ANN. § 50-6a05(a) (West, Westlaw through 2005 Reg. Sess.); MO. ANN. STAT. § 512.085(1) (West, Westlaw through 2006 2d Reg. Sess. of the 93d Gen. Assem.); NEV. REV. STAT. § 20.035(1) (West, Westlaw through 2005 73d Reg. Sess., 22d Spec. Sess., and Nov. 2006 Gen. Election); N.J. STAT. ANN. § 52:4D-13(b) (West, Westlaw through L.2006, c. 102 and J.R. No. 3); OKLA. STAT. ANN. tit. 12 § 990.4(B)(5) (West, Westlaw through 2006 2d Ex. Sess.); 35 PA. CONS. STAT. ANN. § 5701.309(a) (West, Westlaw through Reg. Sess. Act 2006-116 and 2005-2006 1st Spec. Sess. Act 1); S.C. CODE ANN. § 18-9-130(B)(1) (Westlaw through 2006 Reg. Sess.).

137. LA. REV. STAT. ANN. § 39:98.6 (Westlaw through 2006 1st Ex. and Reg. Sess. Acts); LA. CODE CIV. PROC. ANN art. 2124(B)(1)(a) (Westlaw through 2006 1st Ex. and Reg. Sess. Acts).

138. N.Y. C.P.L.R. 5519(g) (McKinney, Westlaw through L.2006, ch. 744).

state legislature systematically, if not exclusively, favors the interests of resident individuals and firms. On most issues, out-of-state litigants have nowhere near the same influence over its deliberations as in-state interests.”<sup>139</sup> The jury that returned a plaintiff’s verdict for punitive damages will usually have found that the defendant’s tort was malicious, intentional, or committed with reckless disregard of the consequences. Finally the tortfeasor may be a tobacco company, a notorious public health menace, for tobacco kills over 400,000 Americans a year.

The Minnesota Smoke Free Coalition identified the tort reformers’ difficulties:

While these appeal bond limits would make things easier for the cigarette companies, there is no evidence that the companies need or deserve such special protection.

“Appeal bond limits are special interest, special protection legislation being pushed by tobacco companies,” said Jeremy Hanson, Public Policy Director of the Minnesota Smoke-Free Coalition. “For an industry that kills 5,600 Minnesotans each year to ask for special legal protections is simply mind-boggling,” added Hanson.

...

Minnesota companies are not in danger of going bankrupt from large appeal bond requirements. To date, no Minnesota business has gone bankrupt under the existing appeals bond law that was passed in 1979. “Appeals bond limits are a solution looking for a problem.”<sup>140</sup>

Proponents of tort reform are loose coalitions of actual and potential tort defendants. Physicians are more interested in a med-mal pain-and-suffering cap than manufacturers and retailers. The actual and potential defendants in Big Ones possess the most concentrated interest in appeal-bond reform. Consumer groups and trial lawyers who represent plaintiffs comprise tort reform’s opponents. Public-health and anti-tobacco forces joined the opposition to appeal-bond caps.

What arguments did tort reformers adduce to convince the states’ legislatures to pass appeal-bond capping statutes on behalf of tortfeasors like TortCo with huge judgments against them?

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139. George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 365.

140. *Big Tobacco Cries Wolf with Appeal Bond Cap Legislation*, MINNESOTA SMOKE FREE COALITION, March 16, 2004, <http://www.smokefreecoalition.org/news/press/index.asp?id=434&dir=/news/press/>.

### A. Tort Reformers' Arguments for Appeal-Bond Caps

Despite the difficulties facing the out-of-state corporations seeking tort reform, their arguments prevailed before many state legislatures. This Part discusses these arguments.

Tort reformers present arguments for appeal-bond caps to a rulemaking body to amend a procedural rule. The petition to the Illinois Supreme Court urging an amendment to the state rule is one of the most comprehensive statements of the arguments for an appeal-bond cap.<sup>141</sup> Other arguments are adduced to a legislature to amend the state's statutes.<sup>142</sup>

#### 1. Ambivalence about the Role of Juries in Civil Cases

To begin with, I will make two general points about the tort reformers' foundation for arguments for appeal-bond caps. Both the civil jury and punitive damages are United States species, rare or extinct in the rest of the world.

"No other country routinely uses juries in civil cases."<sup>143</sup> Many policymakers in courts and legislatures are ambivalent about the civil jury as an institution. A good example of someone on both sides of the issue was former Justice O'Connor dissenting in *TXO Production v. Alliance Resources*. She wrote that:

The jury system has long been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. . . . But jurors are not infallible guardians of the public good. . . . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decision making. Modern judicial systems therefore incorporate safeguards against such influences. . . . Courts long have recognized that jurors may view large corporations with great disfavor. . . . [J]uries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.<sup>144</sup>

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141. *In Re Proposed Amendment to the Appeal Bond Requirements in Illinois Supreme Court Rule 305*, 2003 WL 22340460 (Ill. May 12, 2003) [hereinafter *Illinois Petition*].

142. In a jurisdiction with a discretionary bond-amount, *see supra* notes 40-45, and accompanying text, an appellant seeking to reduce or vary security or a bond for good cause may argue to a judge against a full-amount appeal bond; this contextual argument is not our subject here.

143. AM. LAW INST./UNIDROIT, *supra* note 12, at 6.

144. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 473, 474, 490, 491 (1993) (O'Connor, J., dissenting) (internal citations omitted).

Although the civil jury has constitutional status in the United States' and its states' courts, the "runaway jury" is a key villain in a tort reformer's rogues' gallery. A judge can nip a civil jury on the edges under the Reexamination Clause.<sup>145</sup> Or the legislature can pass tort reform legislation.<sup>146</sup>

## 2. Ambivalence about Assessment of Punitive Damages

Second, the argument for common-law punitive damages is a precarious one. Punitive damages, like the civil jury, are firmly ensconced in the United States. The argument that a civil plaintiff's remedies should include the potential to recover punitive damages to punish and deter defendants' outrageous behavior has prevailed in the majority of states and the federal system.<sup>147</sup> However, the lack of legislation defining the potential defendant's misconduct punishable by punitive damages, the absence of criminal procedural protection before punishing the defendant with punitive damages, and the "windfall" to the plaintiff who recovers punitive damages all militate against universal and unqualified public and professional approbation for punitive damages.

The approach courts and legislatures have most frequently taken is that punitive damages, while often salutary, may be subject to abuse. This potential for abuse leads courts and legislatures to develop principles of confinement to assure that punitive damages serve their policies of punishment and deterrence. These limitations include a restrictive threshold standard, an enhanced burden of proof, caps on the amount, ratios, bifurcation of the trial, and sharing with the government.<sup>148</sup> "Punitive damages tort reform," Professor Michael Rustad wrote, "is perhaps the most successful legal reform movement in

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145. *Cooper Indus., Inc v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436-41 (2001) (holding that consistent with the Re-examination Clause, a United States Court of Appeals conducts its constitutional due-process review of a district court jury's punitive damages verdict de novo instead of using the more deferential abuse-of-discretion standard of review usually accorded to findings of fact).

146. *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 69 (Neb. 2003).

147. Arguments to abolish common-law punitive damages lost in *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985). For Professor Gotanda's careful comparative-law survey showing that punitive damages are rare in civil-law nations and limited in common-law nations, see John Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391 (2004).

148. *Tuttle*, 494 A.2d at 1354; Michael Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1300, 1311-59 (2005) (legislative tort reform of punitive damages).

Anglo-American jurisprudence.”<sup>149</sup> In the last decade, the Supreme Court pursued judicial tort reform of punitive damages by refining a major principle of confinement—post-verdict judicial review for excessiveness, applying the *Gore-Campbell* standards.<sup>150</sup>

### 3. Uncapped Bonds Obsolete in Mass Litigation

Turning to the tort reformer’s specific arguments for appeal-bond caps, to begin with, they argue that full-amount or uncapped appeal-bond statutes are obsolete in a contemporary litigation landscape that includes mass torts, class actions, and massive, indeed astronomical verdicts.

The epoch of the unjust gigantic jury verdict has arrived. The Illinois petition states the tort reformers’ argument in a nutshell, “Potentially devastating judgments used to be relatively rare. . . . Times have changed.” Perhaps the key change was that “[t]he increasing prevalence of class action lawsuits in Illinois compounds the issue.”<sup>151</sup> “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.”<sup>152</sup>

### 4. Erroneous Judgments Evade Review

In particular, certain regions and trial courts are notorious for generating exorbitant jury verdicts. One example, Madison County, Illinois was the venue for the *Price* litigation. In tort reformers’ vernacular, these plaintiff-biased courts are “Judicial Hellholes,” which I shorten herein to “Tort Hells.”<sup>153</sup>

It is “impossible,” the tort reformer insists, for the huge-judgment

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149. Rustad, *supra* note 148, at 1359.

150. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). On the Court’s judicial tort reform, see Rustad, *supra* note 148, at 1360-67.

151. *Illinois Petition*, *supra* note 141, at 10-11.

152. Glenn G. Lammi & Justin P. Hanke, *State Appeal Bond Reforms Protect Defendants’ Due Process Rights*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash., D.C.), Nov. 12, 2004, at 1, available at <http://www.wlf.org/upload/111204LBlammiSTATE.pdf>.

153. Steven Hantler, Mark Behrens & Leah Lorber, *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1173-76 (2005) (referring to “Judicial Hellholes”); see also *Judicial Hellholes*, AM. TORT REFORM FOUND., 2004, <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf> (last visited May 30, 2006).

defendant to post an appeal bond in the full amount of a titanic verdict. William Pryor, then Attorney General of Alabama, maintained that, “When governments pursue novel legal theories against entire industries for enormous sums of money, there needs to be a fair chance for the appellate courts to ensure that the process is fair and the law is sound.”<sup>154</sup> Appeal bond caps are necessary “so that defendants don’t have to go bankrupt merely to pursue an appeal from an adverse trial verdict.”<sup>155</sup>

To quote from the Illinois petition, “a litigant’s right to appeal from an adverse judgment is a bedrock principle in our system of justice.”<sup>156</sup> The combination of a huge plaintiff’s verdict and the defendant’s inability to post an appeal bond means that the judgment, although perhaps erroneous, will nevertheless evade appellate review. The gigantic-verdict defendant denied an appeal, will be denied due process.

If the defendant cannot appeal, the Tort Hell trial court’s error will not be identified and corrected. The aberrant trial court will not be suppressed. If the plaintiff’s judgment was erroneous or excessive, that mistake will evade review. The Illinois petition notes that limiting meaningful appellate review perpetuates error. “In over 32% of all civil cases, the Illinois Appellate Court reverses some aspect of the trial court’s judgment, and the Illinois Supreme Court reverses still more.”<sup>157</sup> Further, “correction *and* prevention of error . . . are lost if a trial court can enter a judgment and require an appeal bond so large as to effectively insulate its decision from appellate scrutiny.”<sup>158</sup>

The deviant trial court and others like it will continue to enter enormous but erroneous verdicts and judgments. If defendant’s appeal is precluded by inability to post an exorbitant appeal bond, an appellate court’s ability to correct error and formulate legal standards will be frustrated. Hapless defendants will fry in Tort Hell.

The tort reformer points to the irony that the unappealable multi-million dollar plaintiff’s judgment for punitive damages is more vulnerable to reversal or reduction than other judgments, particularly

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154. William Pryor, *Caesar Sues*, THE FEDERALIST SOCIETY, 2001, <http://www.fed-soc.org/Publications/practicegroupnewsletters/litigation/caesarlitv3i2.htm>.

155. Tod Gimbel, Reg’l Dir., State Government Affairs, Altria Corporate Services, Inc., to the Rotary Club of Lansing, *Changing to Address Society’s Expectations: A Business Imperative* (May 21, 2004), available at [http://www.altria.com/media/executive\\_speech/03\\_09\\_02\\_35\\_TGimbel05212004.asp](http://www.altria.com/media/executive_speech/03_09_02_35_TGimbel05212004.asp).

156. *Illinois Petition*, *supra* note 141, at 24.

157. *Id.* at 15.

158. *Id.* at 15 (emphasis added).

after the Supreme Court's 2003 decision in *State Farm v. Campbell*.<sup>159</sup> Although the United States Supreme Court has insisted on intensive post-verdict judicial review for excessiveness of a plaintiff's punitive damages judgment, a state's full-amount appeal bonding requirement thwarts this appellate review. The defendant lacks realistic access to the post-verdict judicial review of a punitive damages verdict that the constitution mandates.

### 5. Huge Appellate Bonds Create Unfair Negotiating Advantage

Suppose that the lower-court decision is erroneous or its judgment is excessive and likely to be reversed or reduced. Requiring the defendant to post an appeal bond in the full amount of a mammoth judgment gives the plaintiff unfair leverage to negotiate an unbalanced settlement pending the defendant's appeal. The Manhattan Institute for Policy Research's *The Seven Myths of Highly Effective Plaintiffs' Lawyers*, describes a changing litigation environment, observing that "[t]he system coerces defendants to settle . . . by requiring defendants to forgo appeals because they cannot afford to post an appeal bond."<sup>160</sup> The Washington Legal Foundation agrees that "[t]he 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."<sup>161</sup> The Illinois Supreme Court, amending the state's appeal-bond rule, concurred; it wrote that "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."<sup>162</sup>

### 6. Encouragement of Bogus Substantive Theories

In the shadow of a full-amount appeal bond, an unscrupulous plaintiffs' lawyer, knowing that defendant's appellate correction will be thwarted, may foist a marginal or bogus substantive theory off on a dull witted, naive, or compliant trial judge down in Tort Hell. The

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159. See *supra* notes 59-67, and accompanying text, and notes 148-150, and accompanying text.

160. Steven B. Hantler, *The Seven Myths of Highly Effective Plaintiffs' Lawyers*, CIV. JUST. F. (Manhattan Inst. for Pol'y Research, New York, N.Y.), April 2004, at 12, available at [http://www.manhattan-institute.org/pdf/cjf\\_42.pdf](http://www.manhattan-institute.org/pdf/cjf_42.pdf) (citing 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, 257 n.102 (2000)).

161. Lammi & Hauke, *supra* note 152, at 2.

162. ILL. SUP. CT. R. 305, June 5, 2004 cmt., para. (a).

Washington Legal Foundation's, Glenn G. Lammi and Justin P. Hauke wrote that:

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* . . . .<sup>163</sup>

Mr. Mark Behrens, a leading tort reform proponent, gave an example of defendants settling a plaintiff's bogus substantive legal theory because of a full-amount bonding requirement; his example was the tobacco companies' decisions to settle the states' attorneys generals' Medicaid reimbursement lawsuits. "Bonding requirements were a driving force behind the massive \$246 billion [MSA] settlement."<sup>164</sup> The Washington Legal Foundation agreed that:

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.<sup>165</sup>

In my study of the Mississippi Medicaid reimbursement lawsuit in the runup to the MSA, I concluded that, because the substantive law, although murky, did not support the plaintiff, the defendants' decision to settle that lawsuit for several billion dollars was motivated by something other than a careful study of the risk of substantive liability.<sup>166</sup> Except for the Minnesota litigation, which was settled during trial, the Medicaid reimbursement lawsuits were settled in separate states at varying pretrial stages. So far as I know, the settling defendants said nothing at the time about ominous appeal bonds. I think it strained, perhaps farfetched, to argue that full-amount appeal-bond requirements were *the* reason the tobacco companies settled, though they may have been one factor among many others.

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163. Lammi & Hauke, *supra* note 152, at 3.

164. *Legislation to Protect the Right to an Appeal: Hearing on S.B 161 Before the Ohio House Civil and Commercial Law Comm.* 2002 Leg., 124th Sess. (Oh. 2002) (statement of Mark Behrens, Esq. of Shook, Hardy & Bacon), available at <http://www.alec.org/index.php?id=1113>. See also Behrens & Kochan, *supra* note 118, at 516.

165. Lammi & Hauke, *supra* note 152, at 2.

166. Rendleman, *Common Law Restitution*, *supra* note 84, at 930.



### 7. “It Can’t Happen Here”: Presenting the Sympathetic Judgment Debtor

Some judgment debtors are more sympathetic than others. Narrative, a simple compelling story of injustice, can play a powerful influence in persuading a legislature. Enter Raymond Loewen, the Poster Boy for the appeal-bond cap, a sympathetic face on the tort reformer’s claim to legitimacy.<sup>167</sup>

Loewen, a Canadian funeral home and insurance chain, had a business dispute about three contracts and an exchange with a competitor, O’Keefe, a chain in Mississippi. O’Keefe sued Loewen in Mississippi state court. During a seven-week trial, O’Keefe’s lawyers made, Loewen charged, irrelevant and prejudicial allusions to Loewen’s nationality, race, and social class. The jury eventually awarded O’Keefe \$500 million damages, \$400 million of it punitive damages. Although an appeal-bond cap went into effect later, Mississippi’s full-amount appeal bond provision, as applied by the trial judge and the state supreme court, required Loewen to post an appeal bond of 125% of the verdict, \$625 million, to stay O’Keefe’s collection during Loewen’s appeal.<sup>168</sup> Loewen, thinking that the bond requirement foreclosed his right to appeal, knuckled under and settled with O’Keefe for \$129 million.<sup>169</sup>

O’Keefe’s lawsuit against Loewen reached a reported decision when Loewen instituted a NAFTA proceeding against the United States. Loewen charged that what had happened in the Mississippi courts violated Chapter Eleven of the North American Free Trade Agreement, but he was unsuccessful.

We usually think that an invasion from Canada would be repulsed in the United States’ northernmost tier, for example New York, North Dakota, and Montana. Is a Deep South court and jury the United States’ first line of defense against the wily Canadians? The NAFTA tribunal found that the Mississippi plaintiff’s lawyers had made inflammatory nationality, race, and class arguments. Moreover, the jury had not understood the judge’s instructions.<sup>170</sup> “[T]he conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in

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167. *Loewen Group, Inc. v. United States*, 42 I.L.M. 811, 825-826 (2003). For the Loewen story through the settlement, see Harr, *supra* note 3, at 70.

168. Harr, *supra* note 3, at 70, 93-94.

169. *Id.* at 70, 95.

170. *Loewen Group*, 42 I.L.M. at 825-826.

international law[.]” the tribunal concluded.<sup>171</sup>

In the end, however, the NAFTA tribunal rejected Loewen’s contention on the ground that, although serious errors had occurred in the Mississippi litigation, Loewen had not exhausted local remedies by pursuing his state-court appeal with more assiduity and petitioning to the United States Supreme Court.<sup>172</sup> In short, if Loewen could have posted an appeal bond in a reasonable and civilized amount, the appellate courts would have reversed the unfair jury verdict, thereby eliminating international embarrassment and improving our relations with our Neighbor to the North. With Loewen’s plight before us, we will return to the tort reformers’ arguments for an appeal bond cap.

#### 8. Trial Court Discretion to Decrease Bond Amount Insufficient

But, a skeptic might ask, don’t many appeal-bond statutes and rules give the trial judge discretion to set a reduced bond for good cause?<sup>173</sup> The federal or a state’s discretionary appeal bond provision may set the full amount of the judgment as merely the presumptive amount of the bond, but will entrust the judge with discretion to reduce a bond for good cause.

Insufficient protection, the tort reformer’s argument continues. A discretionary appeal-bond provision will not protect an enormous-verdict defendant adequately. For the very same judge who presided over the plaintiff-favoring Tort Hell courtroom will exercise his discretion to stick it to the helpless defendant. The legislature should cap the state’s discretionary appeal bond statute because “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.”<sup>174</sup>

#### 9. Secondary Consequences to Creditors, Suppliers, and Employees

In addition to undermining the judgment debtor’s financial health, a state’s unreformed uncapped bond sends out further ripples of ill consequences. Suppose that a large business corporation will be forced into bankruptcy. Its creditors and suppliers will not be paid. Its

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171. *Id.* at 819.

172. *Id.* at 846.

173. *See supra* notes 40-45, and accompanying text, regarding discretionary bonds, and *supra* notes 46-51, and accompanying text, regarding mandatory, full-amount bonds.

174. Behrens & Kochan, *supra* note 118, at 518.

employees will be thrown into unemployment. Its innocent shareholders will lose their investments. The state's salubrious business climate will chill. The public's confidence in its judicial system will be eroded. Grass will grow in the streets, and not just in Tort Hell.

Wisconsin's Governor Doyle insisted that an appeal-bond cap would protect local business; "[i]t's important," he said, "that we ensure that workers' jobs and pensions are protected while a multi-million or billion dollar settlement is on appeal. [Assembly Bill] 548 will do just that."<sup>175</sup>

#### 10. Protection of MSA Payment Streams

What supports an appeal-bond cap on behalf of a MSA defendant? A few years ago, state governments were the tobacco companies' vigorous adversaries; but under the MSA, they must cultivate a more fertile legal environment for tobacco to protect their streams of MSA payments. One of the arguments against the settlements in the attorneys' Medicaid reimbursement litigation against the tobacco companies was that floating on the stream of payments in the MSA converted the state governments into business partners with their former adversaries, the tobacco companies. A skeptic questioned whether "the State of New York has an economic interest in the continued financial health of an industry that has lied to policymakers for years, violated New York laws and deceived millions into a life of addiction and early death."<sup>176</sup>

The requirement that Philip Morris post a \$12 billion appeal bond in Illinois to stay collection in *Price* led it to express doubt that it would be able to meet the \$2.6 billion obligation that the MSA called for in April 2003. States that had planned to securitize their streams of MSA payments found these plans in doubt, delayed, or abandoned. The Illinois petition insisted that "[t]he inability of a cigarette manufacturer to post a multi-billion-dollar appeal bond threatens to force such a manufacturer into bankruptcy and disrupt payments to the State under the MSA."<sup>177</sup> Thirty-seven state attorneys general joined the Illinois

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175. Press Release, Wisconsin Office of the Governor Jim Doyle, Governor Doyle Signs Two Bills Into Law (December 12, 2003), available at [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?prid=345](http://www.wisgov.state.wi.us/journal_media_detail.asp?prid=345).

176. John Caher, *N.Y. Bill Would Cap Tobacco Suit Appeal Bonds*, N.Y. L.J., July 26, 2004, at 1, available at [http://www.tobacco.org/news/171125.html?show\\_intro=0&records\\_per\\_page=100&top\\_only=1](http://www.tobacco.org/news/171125.html?show_intro=0&records_per_page=100&top_only=1) (quoting Blair Horner, legislative director for the New York Public Interest Research Group).

177. *Illinois Petition*, *supra* note 141, at 23

petition in the *Price* litigation to urge a reduced appeal bond.<sup>178</sup>

Philip Morris, for its part, is aggressively playing on the states' dependence. The company is due to pay \$2.5 billion to the states by April 15 but is warning it may not be able to do so because of the Illinois bond order. Philip Morris is responsible for roughly half of the yearly settlement payment to the states. Its annual payment is usually made early, on March 31, but on [the first], the states didn't get their fix.<sup>179</sup>

Tobacco lobbyists reminded legislatures that if MSA signatories file bankruptcy, the states' annual payments are at risk. "William H. Sorrell, the Vermont attorney general, said he has already warned the state's governor and legislators that 'they might not be getting money they have already spent'—\$13 million, in Vermont's case."<sup>180</sup> "[F]inancial uncertainty due to potentially unbondable judgments in Illinois raises substantial questions concerning these cigarette manufacturers' ability to make payments under the MSA."<sup>181</sup>

"Illinois' outdated and profoundly dysfunctional appeal bond requirement is undermining basic defendant's rights as well as putting at risk state revenues that were to come from the tobacco Master Settlement Agreement . . ."<sup>182</sup> "This issue is particularly relevant for state legislators when the defendants are tobacco companies that have entered into settlement agreements" with the states because these agreements require the tobacco companies to "provide ongoing payments to the states."<sup>183</sup>

The Attorney General of Washington reversed her position that "[t]he tobacco industry has targeted our kids, withheld safer products and deliberately misled the public about the safety of smoking . . ."<sup>184</sup> Later, however, after the MSA, "[t]he enormous bond 'could create a chilling effect on the ability of the defendant to appeal . . .'"<sup>185</sup> And,

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178. *Illinois Petition*, *supra* note 141, at 6.

179. Gordon Fairclough & Vanessa O'Connell, *Co-Dependents: Once Tobacco Foes, States Are Hooked on Settlement Cash – Philip Morris Verdict Sparks Scramble to Shield Firm*, WALL ST. J., April 2, 2003, at A1.

180. *Id.*

181. *Illinois Petition*, *supra* note 141, at 19.

182. Joseph L. Bast, *Heartland Calls for Reform of Illinois appeal Bond Requirement*, HEARTLAND INST., April 4, 2003, <http://www.heartland.org/Article.cfm?artId=12062>. See also Philip Morris USA, *Legislation and Regulation, Appeal Bond Cap*, [http://pmusa.com/en/legislation\\_regulation/bond\\_cap\\_legislation.asp](http://pmusa.com/en/legislation_regulation/bond_cap_legislation.asp) (last visited Jan. 9, 2007).

183. Mike Pfeil, *Tobacco Settlement Could Dry Up State*, CHIC. DAILY HERALD, March 9, 2003, at 17 (Pfeil is the Vice President of Communications and Public Affairs for Philip Morris USA).

184. Fairclough & O'Connell, *supra* note 179, at A1.

185. *Id.*

more importantly, it “could deal a significant, unnecessary financial blow to the states.”<sup>186</sup>

“Certainly many of us never anticipated that states would become addicted to the tobacco money as a way to finance their operations,” said Scott Harshbarger, who was attorney general of Massachusetts at the time of the settlements. “It’s a perversion of the intention of the litigation, and it’s very unfortunate, both as a matter of public policy and a matter of health policy.”<sup>187</sup>

The Senate of Pennsylvania *Senate Democratic Wrap-up for the 2004-2004 Legislative Session* observed that “[t]he law’s intent is to protect the state’s share of the tobacco settlement to ensure that the Commonwealth will continue to receive funds in the event that a tobacco company that is a party to the Master Settlement Agreement becomes involved in litigation that results in a large judgment-verdict.”<sup>188</sup>

According to the *Price* petition in Illinois, “[s]everal States were forced to abandon, or at least delay, their plans to securitize future tobacco settlement payments.”<sup>189</sup> For example, “Virginia’s treasurer . . . put on hold \$767 million in such bonds.”<sup>190</sup> Further, California planned “to sell \$2 billion of bonds backed by tobacco payments . . . to help finance its huge deficit.”<sup>191</sup> “New York [planned] to float a hybrid \$4.2 billion bond offering backed by personal-income tax revenues and tobacco money.”<sup>192</sup> Finally, “Kansas had planned to float \$175 million in capital-improvement bonds . . . .”<sup>193</sup> If tobacco companies declare bankruptcy, credit ratings on those bonds could be downgraded, further exacerbating state budget problems with higher bond-issuing and borrowing costs.

In *Nevada Testimony*, tobacco lobbyists from Covington and Burling tried to sweeten the deal, stating “there would be a clear indication in the market that [an appeal-bond cap] will help the sale of those securitized bonds. It is a direct correlation.”<sup>194</sup>

Persuaded by the argument that the *Price* verdict put MSA income

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186. *Id.*

187. *Id.*

188. PASenate.com, Senate of Pennsylvania, Senate Democratic Wrap-Up for the 2003-2004 Legislative Session, [http://www.pasenate.com/Weekly%20wrap/OLD\\_YEAR\\_WRAP/2003\\_2004.htm](http://www.pasenate.com/Weekly%20wrap/OLD_YEAR_WRAP/2003_2004.htm) (last visited Jan. 9, 2007).

189. *Illinois petition*, *supra* note 141, at 6.

190. Fairclough & O’Connell, *supra* note 179, at A1.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Nevada Testimony*, *supra* note 69.

at risk, state government officials reacted to the judgment. “The prospect that Philip Morris USA might not be able to make its annual MSA payment on April 15, 2003 prompted 37 state attorneys general and the National Conference on State Legislatures to file an amicus brief in the *Price* case urging a lower appeal bond.”<sup>195</sup>

#### 11. No Opposition from Plaintiffs’ Attorneys

Tort-reform lobbyists pointed out the absence of plaintiffs’ lawyers’ opposition to appeal-bond caps. Lobbyists for tobacco companies Brown and Williamson, Lollard, and Philip Morris testified in support of Nevada Senate Bill 576 that:

The Trial lawyers essentially, although, they are not supporting the bill, withdrew their opposition to it because of the danger to the [MSA]. . . . We had discussions with the trial lawyers, and while it is generally not their position to support any limitation like this because of the potential impact on the Master Settlement Agreement, they “held their nose” and did not testify.<sup>196</sup>

Jack Stewart, president of California Manufacturers & Technology Association, a group with tobacco company members, stated that the appeal-bond cap “never would have happened if the state hadn’t been in debt, needing to securitize the tobacco money, . . . I think it would have been a very hard sell.”<sup>197</sup>

#### 12. Get on the Bandwagon! Or “All the Other Kids’ Mothers Let Them Post Appeal Bonds Lower Than Their Judgments”

A list of new appeal-bond caps in other states follows this recurring argument. In the *Illinois Petition*, “seventeen States have now taken steps [to enact appeal bond reform].” The *Illinois Petition* added that in 2000 Georgia, Kentucky, North Carolina, and Virginia had modified their appeal bond provisions in anticipation of the *Engle* verdict. Further, the *Illinois Petition* notes that in 2001, Louisiana, Nevada, Oklahoma, West Virginia, and Mississippi enacted appeal bond reforms. Finally, after *Price*, Arkansas, Idaho, and Kansas all enacted reforms. The *Illinois Petition* concluded with an appendix detailing all appeal

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195. *Illinois Petition*, *supra* note 141, at 20.

196. *See Nevada Testimony*, *supra* note 69.

197. Vanessa O’Connell, *New Laws Help Tobacco Makers with Big Judgments – Amid Aggressive Lobbying, Many States Cap How Much Is Set Aside During Appeal*, WALL ST. J., July 19, 2004, at A1.

bond reforms then currently instituted.<sup>198</sup> “It is also important there are seven states, currently, that have passed such legislation and many others pending. I think you are going to see this as a trend throughout the country.”<sup>199</sup> The trend continued in Utah testimony by a tobacco lobbyist, that “thirty states have adopted similar legislation and five states have no supersedeas bond requirement.”<sup>200</sup>

The snowballing is featured in Altria’s Annual Reports. From 2003: “In 2001, only five states had appeal bond caps and five states plus Puerto Rico did not require a bond. As of year-end 2003, 30 states and Puerto Rico, representing nearly two thirds of the U.S. population, had appeal bond caps in place or did not require one.”<sup>201</sup> Then in 2004: “Today, including the addition this week of South Carolina, 34 states and Puerto Rico, representing more than 75% of the U.S. population, have such caps in place or do not require one.”<sup>202</sup>

Finally, the North Dakota Farm Bureau’s president Eric Aasmundstad, writing the state’s Supreme Court, observed that “[f]ortunately, multimillion-dollar verdicts are rare in North Dakota. Nonetheless, we should not be the last state in the nation to reform our bonding requirements.”<sup>203</sup> That’s momentum.

### 13. Assistance from the Legislative Process—Andrews’s Axioms

Is there something in the legislative process that augments the force of the tort reformers’ reason and logic? While it is difficult to identify specifics, I will speculate about the legislative process and tort reform.

Professor John Leubsdorf’s critique of reformers’ prospects for procedural advances was pessimistic. “Political realities,” he wrote, “discourage legislative procedural reform. The public has little grasp of civil procedure and little interest in it.”<sup>204</sup> The potential tort defendants

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198. *Illinois petition*, *supra* note 141, at 17-18, 32.

199. *Nevada Testimony*, *supra* note 69 (statement of Alfredo Alfonso, Lobbyist, R.J. Reynolds Tobacco Holdings Inc.).

200. Minutes of Utah Supreme Court Advisory Committee on the Rules of Civil Procedure (July 28, 2004), at 3, *available at* <http://www.utcourts.gov/committees/civproc/materials/2004-09-22.pdf>.

201. Letter from Louis C. Camilleri, Chairman of the Bd. and C.E.O., Altria Group Inc., to shareholders (Mar. 1, 2004), at 6, *available at* [http://www.altria.com/download/pdf/investors\\_2003\\_AnnRpt\\_Letter\\_Tribute\\_section2.pdf](http://www.altria.com/download/pdf/investors_2003_AnnRpt_Letter_Tribute_section2.pdf).

202. Louis Camilleri, Chairman of the Board and CEO, Altria Group, Inc., Remarks at the 2004 Annual Shareholders Meeting Altria Group, Inc. (April 29, 2004), at 2, [http://www.altria.com/download/pdf/media\\_AM2004\\_ChairmansRemarks\\_29Apr04.pdf](http://www.altria.com/download/pdf/media_AM2004_ChairmansRemarks_29Apr04.pdf).

203. Dale Wetzal, *Cigarette Company Seeking Appeal Bond Cap*, BISMARCK TRIBUNE, Aug. 23, 2004, *available at* <http://www.tobacco.org/news/173794.html>.

204. John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 613 (1984).

are repeat players that are likely, in the long run, to achieve most of their goals in legislatures.<sup>205</sup>

Professor Richard Abel argued for a judicial, as opposed to a legislative, role in torts. Courts deliberate, he insisted, and they “tend to be populist . . .”<sup>206</sup> On the other hand, he wrote, special interests capture legislatures which are, in addition, “secretive, hasty, and unwilling or unable to offer reasons . . .”<sup>207</sup> What allows special interests to “capture” a legislature?<sup>208</sup> First, the legislators need the special interests’ campaign contributions.<sup>209</sup> Second, tort victims are not organized.<sup>210</sup> The legislature, Abel maintains, may subordinate common law tort principles, deterrence, loss spreading and moral judgment, to tort reform at the behest of organized special interests. The people who lose out in tort reform are, he observes, the people who will be seriously injured in the future.<sup>211</sup> Legislative mechanisms cannot promise legislation that implements majority preferences.

Andrews’s Axioms flesh out Leubsdorf’s and Abel’s points. They were promulgated by the late Hunter Andrews, a voluble and acerbic Virginia state Senator, then Majority Leader, in a private conversation at a Democratic Party barbecue in Tidewater. In retrospect, this reality of Virginia legislative government is self-evident, although not susceptible to empirical proof or disproof.

I took the liberty of having the senator’s private ear to reprove the General Assembly for passing a statute that disfavored a major Democratic constituency—low-income consumers—in favor of banks and other, mostly Republican, creditors.<sup>212</sup> This travesty had passed the Senate unanimously late in the session. I was nonplused to learn that Hunter didn’t remember it. I explained the legislation, its influential patron, and his timing to Hunter and asked what they could have been thinking about.

Talking down only a little to a “perfesser,” Senator Andrews explained, forcefully articulating Andrews’s Axioms: The combined

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205. *Id.* at 613-14.

206. Richard Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533 (1999).

207. *Id.*

208. *Id.* at 535-36.

209. *Id.*

210. *Id.* at 537.

211. *Id.* at 546-56.

212. VA. CODE ANN. § 34-3.1 (2000) (federal bankruptcy exemption opt-out); Doug Rendleman, *Liquidation Bankruptcy Under the '78 Code*, 21 WM. & MARY L. REV. 575, 651-52 (1980).



facts that the bill had a powerful patron and passed unanimously in the closing days of the session guaranteed that the senators, individually and collectively, were unlikely to have known what they were voting on. The bill was technical which assured that the senators wouldn't have understood it if they had known its contents. The patron's influence and his timing did it.

State legislative history has historically been hard to discover. Today, however, the ubiquitous computer has facilitated that research. State legislative journals are available to the assiduous researcher through the state governments' websites; targeted internet searches also generate interesting and useful information.<sup>213</sup> Some evidence vindicates Senator Andrews's observations in state legislatures' enactment of appeal-bond caps.

As of July 2006, 33 states have passed appeal-bond cap statutes or adopted rules. Some have passed two bills—for a total of 36 cap bills plus three court rules.<sup>214</sup> Ten states passed appeal bond bills with unanimous votes in both houses, and nine more passed such bills with four or fewer negative votes in both houses.<sup>215</sup> Of the remaining states,

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213. Here the author thanks two diligent and persevering research assistants Mr. Andrew Howard and Mr. Tim Dooley.

214. *See supra* note 117.

215. CAL. ASSEM. JOUR., 2003-2004 Reg. Sess., No. 82, at 2149 (June 3, 2003), available at <http://www.assembly.ca.gov/clerk/billslegislature/srchframe.htm> (noting passage of Assem. B. 1752); CAL. S. JOUR., 2003-2004 Reg. Sess., No. 115, at 1986-87 (July 27, 2003), available at <ftp://www.leginfo.ca.gov/pub/senate-journal/sen-journal-0x-20030727-1971.PDF> (same); FLA. H.R. JOUR., 2003 Reg. Sess., No. 33 (May 2, 2003) (Westlaw) (voting on S.B. 2826); FLA. S. JOUR., 2003 Reg. Sess., No. 17 (Apr. 25, 2003) (Westlaw) (same); FLA. H. JOUR., 2000 Reg. Sess., No. 23 (Pt. 2) (May 5, 2000) (Westlaw) (concerning CS/H.B. 1721); FLA. S. JOUR., 2000 Reg. Sess., No. 22 (May 3, 2000) (Westlaw) (same); GA. H.R. DAILY REP., 2004 Reg. Sess., No. 35 (2004) (Westlaw) (passing S.B. 411); GA. S. DAILY REP., 2004 Reg. Sess., No. 8 (2004) (Westlaw) (same); IND. H. ROLL CALL, 2002 Reg. Sess., H.B. 1204 (Jan. 28, 2002) (Westlaw); IND. B. INFO., Action List: House Bill 1204, <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2002&request=getActions&doctype=HB&docno=1204> (last visited Nov. 21, 2006); KAN. S. JOUR., 2005 Reg. Sess., No. 53 (Mar. 25, 2005) (Westlaw) (adopting H.B. 2152); KAN. H.R. JOUR., 2005 Reg. Sess., No. 34 (Feb. 25, 2005) (Westlaw) (same); KAN. H.R. JOUR., 2003 Reg. Sess., No. 52 (Mar. 27, 2003) (Westlaw) (passing S.B. 64); KAN. S. JOUR., 2003 Reg. Sess., No. 31 (Feb. 25, 2003) (Westlaw) (same); KY. H.R. JOUR., 2000 Reg. Sess., No. 56 (Mar. 27, 2000) (Westlaw) (voting on S.B. 316); KY. S. JOUR., 2000 Reg. Sess., No. 41 (Mar. 6, 2000) (Westlaw) (same); LA. S. JOUR., 2003 Reg. Sess., No. 47 (June 21, 2003) (Westlaw) (concerning passage of H.B. 1819); LA. H.R. JOUR., 2003 Reg. Sess., No. 28 (May 21, 2003) (Westlaw) (same); LA. H.R. JOUR., 2001 Reg. Sess., No. 48 (June 15, 2001) (Westlaw) (adopting H.B. 1807); LA. S. JOUR., 2001 Reg. Sess., No. 42 (June 14, 2001) (Westlaw) (same); MICH. S. JOUR., 91st Leg., 2002 Reg. Sess., No. 39 (May 2, 2002) (Westlaw) (passing H.B. 5151); MICH. H.R. JOUR., 91st Leg., 2002 Reg. Sess., No. 13 (Feb. 14, 2002) (Westlaw) (same); NEB. LEGIS. JOUR., 2004 Reg. Sess., No. 60 (Apr. 15, 2004) (Westlaw) (voting on Legis. B. 1207); NEV. S. JOUR., 71st Sess., No. 109 (May 24, 2001) (Westlaw) (noting passage of Assem. B. 576); NEV. ASSEM. JOUR., 71st Sess., No. 79 (Apr. 24, 2001) (Westlaw)

Illinois, Mississippi, and South Dakota imposed appeal bond reform by Supreme Court Rule.<sup>216</sup> In Iowa, SF 2306 was assigned to the House committee on Rules and Administration, and with six other bills passed unanimously.<sup>217</sup> In North Carolina's appeal-bond reform, Senate Bill 2, was the second to last enacted bill of the session.<sup>218</sup>

In the six states where appeal bond statutes were not approved unanimously, appeal bond caps were included in other "tort-reform" bills.<sup>219</sup> Nebraska's unicameral legislature passed its appeal bond cap 48-0 as part of a 35-page bill.<sup>220</sup> The appeal-bond portion of the bill was initially introduced separately by Senator Quandahl; but it failed to pass and was added to the larger bill by committee amendment.<sup>221</sup> In Arkansas, the bill that included the appeal bond cap was entitled "The Civil Justice Reform Act of 2003" and comprised many "reforms."<sup>222</sup> The Texas appeal-bond cap was one of several "tort reforms," including limitations on medical liability.<sup>223</sup> In California, the cap was added to a social services bill just before it was passed, along with many other budget-related legislation. "This got done with no public discussion, when nobody was looking," said Stanton Glantz, a doctor and anti-

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(same); N.J. ST. LEG., Bills 2002-2003, 210th Leg., S.B. 2738/Assem. B. 3717 (June 30, 2003), <http://www.njleg.state.nj.us/bills/BillView.asp>; N.C. H.R. JOUR., 2003 1st Sess., No. 47 (Apr. 21, 2003) (Westlaw) (passing S.B. 784); N.C. S. JOUR., 2003 1st Sess., No. 40 (Apr. 8, 2003) (Westlaw) (same); N.D. MEASURE ACTIONS, 59th Leg., S.B. 2273 (2005), <http://www.legis.nd.gov/assembly/59-2005/bill-actions/ba2273.html>; OKLA. H.R. JOUR., 2001 Reg. Sess., No. 34 (Apr. 2, 2001) (Westlaw) (voting on S.B. 372); OKLA. B. HISTORY, 2001 Reg. Sess., S.B. 372 (Apr. 10, 2001) (Westlaw); OR. B. HISTORY, 2003 Reg. Sess., H.B. 2368 (Sept. 24, 2003) (Westlaw); PA. B. HISTORY, 2003 Reg. Sess., H.B. 1718 (2003) (Westlaw); PA. H.R. JOUR., 2003 Reg. Sess., No. 109 (Dec. 22, 2003) (Westlaw) (passing H.B. 1718); PA. S. JOUR., 2003 Reg. Sess., No. 84 (Dec. 18, 2003) (Westlaw) (same); S.C. S. JOUR., 2004 Reg. Sess., Apr. 7, 2004 (Westlaw) (adopting H.B. 4823); S.C. H.R. JOUR., 2004 Reg. Sess., Mar. 5, 2004 (Westlaw) (same); TENN. S. JOUR., 2003 Reg. Sess., No. 43 (May 21, 2003) (Westlaw) (voting on S.B. 1687); TENN. H.R. JOUR., 2003 Reg. Sess., No. 36 (May 15, 2003) (Westlaw) (same); VA. S. MIN., March 10, 2004, (Westlaw) (S.B. 172 and H.B. 430); VA. H.D. MIN., March 4, 2004 (Westlaw) (S.B. 172); VA. H.D. MIN., Jan. 29, 2004 (Westlaw) (H.B. 430).

216. ILL. SUP. CT. R. 305(a); MISS. R. APP. P. 8; S.D. SUP. CT. R. 03-13.

217. IOWA S. JOUR., 2004 Reg. Sess., Apr. 13, 2004 (Westlaw).

218. North Carolina no longer makes its legislative history prior to 2003 available on either Westlaw or online.

219. H.B. 1346, 2000 Leg., Reg. Sess. (Ga. 2000); H.B. 92, 57th Leg., 1st Reg. Sess. (Idaho 2003); H.B. 393, 93rd Gen Assem., 1st Reg. Sess. (Mo. 2005); H.B. 2661, 49th Leg., 2nd Reg. Sess. (Okla. 2004); H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003); H.B. 1547, 2004 Leg., Reg. Sess. (Va. 2000).

220. NEB. LEGIS. JOUR., 2004 Reg. Sess., No. 60 (Apr. 15, 2004) (Westlaw); Legis. B. 1207, 98th Leg., 2d Reg. Sess. (Neb. 2004).

221. NEB. B. STATUS, 2004 Reg. Sess., Legis. B. 1207 (Apr. 28, 2004) (Westlaw).

222. H.B. 1038, 84th Gen. Assem., Reg. Sess. (Ark. 2003).

223. H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003).

smoking advocate.<sup>224</sup>

The legislative observer does not need to study “path dependence,” order of consideration, or a single-subject prerequisite to understand Andrews’s Axioms. We can add technical procedure to Dean Levmore’s list of legislative topics upon which “empirical evidence plays a remarkably small role in forming or changing views.”<sup>225</sup>

In short, an argument that would not convince a law professor or a rules-advisory committee member may prevail in the closing days of a legislative session. The legislature may subordinate reason to power and influence.

### *B. Responding to the Tort Reformers’ Arguments*

Opponents of appeal-bond caps replied to the tort reformers’ arguments, ultimately unsuccessfully, by emphasizing that, among other arguments, (1) there is no general problem that needs to be resolved; (2) the gigantic verdicts—the “Big Ones”—are the exception rather than the norm; and (3) the solvent debtors at issue can afford most, if not all, of the appeal bonds at issue.

#### 1. “A Solution in Search of a Problem”

Bismarck, North Dakota attorney Tim Purdon said that:

[An appeal-bond cap] is a solution in search of a problem . . . . We’re worried about Philip Morris doing something so heinous that they get rendered against them the largest jury verdict in the history of North Dakota . . . and in that situation, we’re more concerned about what happens to them than the people they’ve injured.<sup>226</sup>

#### 2. Gigantic Punitive Awards as the Exception

Giant verdicts, tort reformers insist, roast unfortunate defendants in Tort Hell. The facts, opponents respond, do not bear this out. “[J]uries rarely award [punitive] damages, and award them especially rarely in products liability and medical malpractice cases. . . . When juries do award punitive damages, they do so in ways that relate strongly to

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224. Kathleen Pender, *State’s Schizophrenic Relations With Tobacco*, S.F. CHRON., September 2, 2003, at B2. Compare CAL. B. ANALYSIS, S. Floor, 2003-2004 Reg. Sess., Assem. B. 1752 (July 27, 2003) (Westlaw) (adding tobacco securitization to the list of statutory changes), with CAL. B. ANALYSIS, S. Floor, 2003-2004 Reg. Sess., Assem. B. 1752 (June 23, 2003) (Westlaw).

225. Saul Levmore, *Public Choice Defended*, 72 U.CHI. L. REV. 777, 795 (2005).

226. Wetzel, *supra* note 203 (internal quotation marks omitted).

compensatory awards.”<sup>227</sup>

Many large plaintiffs’ verdicts do not become collectable judgments because of the parties’ settlements and post-verdict judicial review. When punitive damages verdicts undergo post-verdict judicial review, judges reduce or parties settle almost all jumbo punitive damages verdicts.<sup>228</sup>

As Professor Michael Rustad summarized:

There is a giant chasm between sound bites about demonized punitive damages gone amuck and the actual patterning of awards. Empirical studies unanimously conclude that high-end punitive damages are rarely awarded, are highly correlated with the plaintiff’s injury, are reserved for truly egregious circumstances, and are often scaled back by trial and appellate judges.<sup>229</sup>

The year 2006 is really too early for a legal researcher or a social scientist to evaluate the way the Supreme Court’s 2003 decision in *State Farm v. Campbell* augmenting post-verdict judicial review will affect post-verdict judicial review of huge punitive damages verdicts.<sup>230</sup> *The National Law Journal*’s verdict survey for 2005 reported that the total awards for the top-100 verdicts “slid for the third straight year.”<sup>231</sup> Moreover, punitive damages are lower, indicating “that jurors apparently have scaled back on huge awards intended to punish defendants in the cases that end up at trial, but they remain committed to trying to make plaintiffs whole.”<sup>232</sup>

### 3. The Media Features High-End, Titanic Verdicts But Not Their Post-Verdict Reductions

“If it bleeds, it leads,” says the axiom of journalism. The points in the previous paragraphs are obscure from public view because the press, even the professional press, reports the newsworthy, the eye-popping jury verdict, not the settlements and post-verdict judicial review that reduce the size of those verdicts. For example, a story in *The National Law Journal* discussed a Texas plaintiff’s jury verdict against Merck for

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227. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) (internal citations omitted).

228. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1415-1419 (2004).

229. Rustad, *supra* note 148, at 1298-99.

230. Eisenberg, *supra* note 101 (explaining data through 2001).

231. Leigh Jones, *Top 100 Verdicts of 2005: It’s a harder sell: Juries will make the injured whole, but big punitives are history*, NAT’L L.J., February 20, 2006, at S2.

232. *Id.*

Vioxx for \$253.4 million; however, the story did not mention that most of the verdict, which was for punitive damages, would be capped at about 10% of the jury's verdict under a Texas statute and leave post-verdict judicial review in both the trial and appellate courts.<sup>233</sup>

#### 4. Solvent Debtors Can Afford Appeal Bonds

A titanic-verdict defendant will find that posting a full-amount bond is impossible, tort reformers maintain. Some insolvent judgment debtors will not be able to post a bond in the full amount of a particular judgment to stay collection during their appeals. This article, however, is about the solvent defendant with a chance of reduction or reversal on appeal. For example, in summation in *Bullock v. Philip Morris*, Philip Morris's lawyer told the jury that Philip Morris "could afford to pay punitive damages of a billion dollars or \$6.666 billion."<sup>234</sup>

For a solvent defendant, although the tort reformer's impossibility argument may be exaggerated, there are some appeals that the judgment debtors probably cannot afford to bond. For example, both the *Engle* verdict for \$145 billion and the *Price* verdict for \$10 billion were reversed on the defendants' appeals.<sup>235</sup>

For many large judgments and judgment debtors, however, the "impossibility" argument is asserted, but not proved.<sup>236</sup> Nowhere among the lamentations and gnashing of teeth in the "impossibility" arguments that I read did I see an exact figure for what an appeal bond would cost an appellant, like the three percent bond premium that I learned during a brief telephone call.<sup>237</sup>

In *Price*,<sup>238</sup> the circuit court judge required Philip Morris to post a \$12 billion bond. The Illinois petition maintained that "Philip Morris USA cannot post a bond in this amount, and thus [it] moved for a

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233. Peter Geier, *Vioxx Trial: Behind the win: showing jurors Merck's good side: A Fiery Defense Counsel Recounts Her Big Win*, NAT'L L.J., November 7, 2005, at 9. See H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003) (capping punitive damages at \$25 million).

234. *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 171 (Cal. Ct. App. 2006).

235. *Liggett Group Inc. v. Engle*, 853 So.2d 434, 440 (Fla. Dist. Ct. App. 2003) (reversing \$145 billion punitive damages judgment), *approved in part, quashed in part, Engle*, 2006 WL 3742610; *Price v. Philip Morris*, 848 N.E. 2d 1 (Ill. 2005), *reh'g denied*, 846 N.E.2d 597 (Ill. 2006).

236. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796-97 (7th Cir. 1986) (expressing doubt that posting a bond will be "impossible").

237. See *supra* note 53.

238. *Price v. Philip Morris, Inc.*, 793 N.E.2d 942, 946 (Ill. Ct. App. 2003), *vacated*, *Philip Morris, Inc. v. Ill. App. Ct., Fifth Dist., No. 96644*, 2003 Ill. LEXIS 2625 (Ill. Sept. 16, 2003) (reinstating an order setting a modified appeal bond).

reduction in the bond.”<sup>239</sup> Altria Group’s SEC Form 10-K also took the position that “[i]t is not possible for PM USA to post [the \$12 billion bond in *Price*] and, absent judicial or legislative relief, PM USA would not be able to stay enforcement of the judgment in Illinois.”<sup>240</sup>

Matthew Myers, president of the Campaign for Tobacco Free Kids, contested the foregoing assertions of “impossibility,” arguing that:

Altria, which isn’t a defendant in the Illinois case and thus isn’t technically liable, could pay the bond for [its subsidiary] Philip Morris. Altria has an \$8 billion credit line and pays about \$5 billion in dividends each year. “Philip Morris wants the court to relieve it of any obligation to make any sacrifice . . . .”<sup>241</sup>

Professor Linke, an Illinois Economics Professor, commented that Altria did have the financial resources necessary to post a \$12 billion appeal bond for Philip Morris in April 2003.<sup>242</sup> Specifically, he noted:

“The statement of ‘Consolidated Statements of Cash Flows’ . . . [in] the Altria 2002 Annual Report makes clear that Altria does have the financial capacity to post a \$12.0 billion bond in April 2003 without limiting its ability to provide needed operating capital to its subsidiaries. Altria spent cash amounts on dividends and repurchases of common stock totaling \$8.1B in 2000, \$8.7B in 2001, and \$11.5B in 2002. These cash outflows were made after PM USA, a subsidiary of Altria, expensed \$5.2B in 2000, \$5.9B in 2001, and \$5.3B in 2002 as part of cost of sales for the payments under the State Settlement Agreements and to fund the trust for tobacco growers and quota-holders. This data make clear that Altria generates sufficient cash flow to pay both its State Settlement Agreements and to post a \$12B bond in April 2003.”

“It is sufficient to note that \$14.6B of Altria’s \$15.0B lines of credit was not drawn on December 31, 2002. . . .”

. . . “While reducing or eliminating dividends and/or share repurchases for six to twenty-four months may be unattractive to Altria, such actions will not impact the demand for its tobacco and food products,

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239. *Illinois petition*, *supra* note 141, at 3 (internal citation omitted).

240. Altria Group, Inc., Annual Report (Form 10-K), at 16 (March 27, 2003), available at [http://www.altria.com/investors/02\\_07\\_01\\_secFilingData.asp?showHeader=True&URL=http://ccb.10kwizard.com/xml/contents.xml?ipage=2078511~repo=tenk](http://www.altria.com/investors/02_07_01_secFilingData.asp?showHeader=True&URL=http://ccb.10kwizard.com/xml/contents.xml?ipage=2078511~repo=tenk).

241. Fairclough & O’Connell, *supra* note 179, at A1 (internal quotation marks omitted).

242. *Illinois Finance Professor, Author Finds Altria Group, Inc. Capable of Posting Tobacco Appeal Bond; Linke’s Analysis Disputes Tobacco Giant’s Claim of Potential Bankruptcy*, PR NEWSWIRE, April 1, 2003.

and therefore, its cash flow.”<sup>243</sup>

Altria responded by pointing again to its SEC filing, previously cited, in which it had said that Philip Morris could not post a \$12 billion bond.

Michael Bopp, New York state lobbyist for the American Cancer Society observed that “[w]e think it’s absurd to regard the tobacco companies, some of the wealthiest companies in the world, as unable to meet their obligations under the civil justice system . . . . They spend \$8 billion-plus marketing these products; surely they can find a way to finance the civil judgments against them.”<sup>244</sup>

#### 5. Alleged Susceptibility to Bankruptcy May Result from the Judgment Debtor’s Other Business Decisions

A legislature may pass an appeal-bond cap as an anticipatory or preventive bankruptcy bailout.<sup>245</sup> An insolvent defendant may file a liquidation or reorganization bankruptcy, and a large appeal-bond premium may create hardship for a solvent defendant like TortCo with a shot at reversal. The tort reformers’ argument that a full-amount appeal bond will force huge-verdict defendants into bankruptcy is also asserted but not proved.<sup>246</sup> A doubter might inquire whether a huge-verdict defendant’s alleged “impossibility” leading to its inevitable bankruptcy results from its hardship in raising an appeal-bond premium or from its business miscues, its tort, TortCo’s defective Gizmo, plus perhaps its other torts, and by the other conditions that led to the plaintiff’s large judgment.

#### 6. The MSA Settlement Agreement was Raised as a Ruse

West Virginia’s Attorney General Darrell McGraw was skeptical because:

This is a lobbyist bill, an anti-injured citizen bill. This is a statement by the state that the tobacco merchandising is more important than the public’s health . . . . It has nothing to do with the [MSA] settlement we

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243. *Id.*

244. O’Connell, *supra* note 197, at A1.

245. In passing the September 11 legislation to compensate victims, Congress was concerned about saving the airlines from being forced into insolvency by victims’ families’ wrongful-death lawsuits, settlements, and judgments. Robert Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 712 (2005).

246. See *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 802 (7<sup>th</sup> Cir. 1986) (Easterbrook, J., concurring) (expressing doubts about the bankruptcy argument).

entered into . . . . That is only a ruse to get a cap on the bond. If the idea is that they want to protect the state's revenue, then they ought to require that (the tobacco industry) post a \$1.8 billion bond and allow the judicial system to work . . . .<sup>247</sup>

*C. Arguments Not Fully Aired in the State Legislatures May Be the Most Persuasive*

Some critics, in the public health community and elsewhere, are indifferent to a tobacco-company defendant's contentions that it will be impossible for it to post a full-amount bond and that it will be forced into bankruptcy. A court's usual approach is that "[t]he punitive damages award should sting, but ordinarily it should not destroy."<sup>248</sup> A court cannot sentence a corporate criminal to jail; it can only punish a corporate malefactor by taking its money. If a court imposes punitive damages to punish corporate misconduct, then why not "destroy" a corporation for unforgivable misconduct? These critics argue that the tobacco companies are death-dealing monsters who should be extirpated forthwith. One way to exterminate the varmints is to use punitive damages judgments as capital punishment.<sup>249</sup>

This observer, and perhaps the critics, would prefer, however, for an appellate court to stamp the imprimatur of correctness on a jury's punitive damages death sentence before loading the corporate defendant on the tumbrel. Even a believer in punitive damages for capital punishment may conclude that the generalized due process argument for an appeal that I develop below is compelling. Militating against punitive damages as capital punishment is the post-verdict judicial review the Supreme Court mandated in *Gore* and *Campbell*.<sup>250</sup> Moreover, some defendants who must deal with jumbo judgments have beneficial attributes aside from the tort or breach of contract that led to a discrete judgment.

Not all arguments were fully vetted before the state legislatures.

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247. Tobacco Litigation: House Passes, then Recalls Bill to Cap Appeal Bonds, Class Action Reporter (Bankruptcy Creditors' Service, Inc., Princeton, N.J., and Beard Group, Inc., Wash., D.C.), April 16, 2001, available at [http://bankrupt.com/CAR\\_Public/010416.MBX](http://bankrupt.com/CAR_Public/010416.MBX) (internal quotation marks omitted).

248. *Life Ins. Co. of Ga. v. Johnson*, 684 So.2d 685, 697 (Ala. 1996), (quoting Davis Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?*, ALA. LAWYER, Mar. 1990, at 94-95), vacated, 519 U.S. 923 (1996).

249. Guardino & Daynard, *supra* note 85; Cynthia Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Products Liability Lawsuits*, 73 IND. L.J. 187, 224-26 (1997).

250. Fairclough & O'Connell, *supra* note 179.



Here, I discuss, first, the judgment-debtor's right to obtain restitution if the judgment debtor appeals without a bond, the plaintiff collects on the judgment during appeal, and the court thereafter concludes that the jury's verdict was improper. I explore, second, what I refer to as the judgment debtor's "lower case" due process right to appeal.

### 1. Judgment Debtor's Right to Restitution for Improperly Collect Judgment

One point, clearly enough established to warrant a restatement section, is absent from the tort reformers' arguments to cap appeal bonds: A judgment debtor may appeal a judgment without posting bond, risk the judgment creditor's collection, and if the appellate court reverses the judgment, recover restitution.<sup>251</sup> The defendant's right to recover restitution for an improperly collected judgment should dampen a plaintiff's ardor to collect while the defendant's appeal is pending.

Even so, a zealous smoker-plaintiff started collection while a punitive damages judgment against a tobacco company was on appeal. In *Bullock v. Philip Morris*, the trial judge had remitted the smoker's family's jury verdict for \$28 billion punitive damages, to \$28 million. Plaintiff filed judgment liens in three states. The court of appeals stayed plaintiff's enforcement and approved the parties' stipulation of treasury bills instead of a bond for a stay. The trial judge sanctioned plaintiff's lawyer for not withdrawing the judgment liens, but the court of appeals reversed the sanction because there was no sanctioning rule in effect then.<sup>252</sup>

Nevertheless, although it should not be excluded from consideration, I am not confident, in the final analysis, what weight to give the plaintiff's right, in the absence of an appellant's bond, to collect and the ultimately successful appellant's right to restitution. If, pending a defendant's unbonded appeal, a judgment creditor filed the judgment for a lien on the defendant's headquarters and factories, ordered the sheriff to levy a writ of execution or Fieri Facias on the art and furniture at defendant's corporate headquarters, or garnished its bank account, then that collection activity would be likely to disrupt a corporation's credit and other business relationships and perhaps the publicity would

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251. See *supra* note 38 and accompanying text.

252. *Bullock v. Philip Morris*, 42 Cal. Rptr. 3d (Cal. Ct. App. 2006). Other collection during an appeal includes *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

affect the market value of its stock.<sup>253</sup>

## 2. Denial of “Lower Case” Due Process Right to Appeal

Without a bond cap, tort reformers argue, defendants will be denied an appeal and due process.

The first response is the preceding point: A judgment debtor that cannot or does not file an appeal bond will not lose its right to appeal, although it will lose its ability to avoid the judgment creditor’s collection techniques.

A second response is that although the tort reformers’ assert that posting an appeal bond is impossible and that defendants will be forced into bankruptcy, they have not sustained these arguments conclusively.

The third response is that a defendant’s due process “right” to an appeal is an illusive argument. Due process is a protean concept that takes different forms in different contexts. United States constitutional due process in a civil matter requires that a defendant receive notice and an opportunity to be heard by the decisionmaker. The Fourteenth Amendment’s Due Process Clause due process is also the foundation for state court personal jurisdiction<sup>254</sup> and for the punitive damages review that we have examined.<sup>255</sup> Some of what we do know about civil constitutional due process is murky, based on dicta. Beyond those minimum requirements and murkiness, we do not know much about civil due process—except from Professor John Leubsdorf’s article.<sup>256</sup> In that article, however, Professor Leubsdorf was concerned about the economic underdog, not TortCo the manufacturer of the injury-dealing Gizmo, our giant corporate apparent tortfeasor.

The *Price* petition in Illinois, in fact, argued for a *state* constitutional due process right to appeal.<sup>257</sup>

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253. Harr, *supra* note 3, at 70, 95.

254. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

255. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

256. Leubsdorf, *supra* note 204.

257. *Illinois petition*, *supra* note 141, at 15-16. Constitutions establish the government’s framework and institutions, including its courts, but I do not find them to create an individual’s due process right to a civil appeal. Litigants have attacked fees and costs that burden their access to courts under equal-protection and open-courts provisions. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 6.07[1] (4th ed., Michie 2006). The West Virginia Supreme Court found that a taxpayer’s bond for an appeal from the tax commission to the trial court violated the state constitution’s open-court provision because the Tax Commissioner, the taxpayer’s adversary, had unchecked discretion to waive the bond or set a substitute; the Supreme Court granted the trial judge power to review the administrative decision. *Frantz v. Palmer*, 564 S.E.2d 398 (2001).

This article adds another layer to constitutional due process. It argues that the judgment debtor's "lower-case due-process" rights are jeopardized in the absence of judicial review. By "lower-case due-process," this article means a due-process concept comprising universal norms of fair procedure discrete from the minimum guarantees in the United States Constitution. Someone who invokes lower-case due process invokes those universal procedural norms. By reviewing the spotty constitutional protection provided by the Fourteenth Amendment for a trial loser's appeal we will learn why we need lower-case due process as a supporting and ancillary concept.

First, a state's full-amount appeal bond provision appears to be constitutional. To protect the successful plaintiff-judgment creditor and to facilitate her ability to collect, a state statute or rule may require a judgment debtor-appellant to secure the appeal.<sup>258</sup>

Second, a losing defendant in a civil lawsuit lacks a United States Constitutional Due-Process Clause right to appeal without posting a required full-amount bond. Indeed, a civil defendant appears to lack a federal constitutional due process right to appeal at all. "This Court," wrote Justice White for the Supreme Court in *Lindsey v. Normet*, "has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review."<sup>259</sup>

Although perhaps not a component of Fourteenth Amendment "due process," an appeal is, however, a basic component of our idea of a fair and accurate decisionmaking system. The losing litigant's lack of a

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258. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Hampshire Vill. Assocs. v. Dist. Court*, 408 N.E.2d 830, 833 (Mass. 1980).

259. *Lindsey*, 405 U.S. at 77 (dicta); *Bell v. Marinko*, 235 F. Supp. 2d 772, 779 (N.D. Ohio 2002); FLEMING JAMES, JR., GEOFFREY C. HAZZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* § 12.7, at 760 (5th ed. 2001); Laycock, *supra* note 27, at 509; Carlson, *supra* note 27, at 31. A convicted criminal defendant has no constitutional due-process right to an appeal either. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The criminal defendant's constitutional right in a criminal appeal also falls under the Equal Protection Clause; that Clause forbids official invidious discrimination against an impecunious litigant. *Id.* A criminal defendant's equal-protection rights during an appeal are "stronger" than a civil defendant's. For example, under the doctrine of abatement ab initio, if a criminal defendant who is appealing from his conviction dies before the appellate court decides his direct appeal, the criminal prosecution is not merely abated, it is expunged. *Commonwealth v. De La Zerda*, 619 N.E.2d 617, 618 (Mass. 1993) (declining to abate deceased defendant's collateral appeal). The expungement includes any unpaid compensatory criminal "restitution." *United States v. Estate of Parsons*, 367 F.3d 409, 416 (5th Cir. 2004). The reason courts give to abate a defendant-decedent's conviction is that appellate review is crucial to the integrity of criminal justice; if the defendant is unable to secure review on appeal, the jury's guilty verdict is nullified. The government may start over - in a civil lawsuit against the decedent's estate, without the benefit of preclusion from the "expunged" criminal trial. *Id.*

federal constitutional right to an appeal is a paradox, for “[a] right of appeal is a generally recognized procedural norm.”<sup>260</sup> A trial loser’s appeal is a crucial principle of containment on concentrated power. It divides power vertically to prevent the trial judge from laying down an arbitrary decision; and it protects the public values of order, stability, and fidelity to the principle of stare decisis.<sup>261</sup> Although the trial loser’s right to appeal lacks United States Constitutional status, such a fundamental right comports with our understanding of what I am calling lower-case due process.

Third, even though a losing civil litigant lacks a federal due process right to an appeal, the legislature may not build an appellate system on a foundation of arbitrary, invidious distinctions.<sup>262</sup> Indeed, in *Lindsey v. Normet*, a tenant’s appeal from a landlord’s Forcible Entry and Detainer eviction of the allegedly undesirable or nonpaying defendant-tenant, the Supreme Court found a violation of the Equal Protection Clause rather than a Due Process Clause right to appeal. Although the state had a prerequisite that the tenant post a double bond for appeal, it required only a single bond for other appellants. The Supreme Court held that requiring a double bond only for a tenant’s eviction violated the Equal Protection Clause.<sup>263</sup> The tenant’s double bond was a classification that created hardship for an impoverished tenant-appellant and perhaps precluded his appeal.

Fourth, Professor Leubsdorf argued for a broader right to appeal. He maintained that, “It is difficult to imagine a civilized system of justice without appeals . . . because appellate review is essential to the consistent and accurate application of the law.”<sup>264</sup> Concerned about procedural barriers that prejudiced an indigent litigant—not a Fortune

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260. AM. LAW INST./UNIDROIT, *supra* note 12, at 151. The basic nature of an appeal came up in 2006 in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). The Supreme Court held that a military commission to try an enemy combatant violated United States law and the Geneva Convention because justice recognized by civilized people required a “regularly constituted court affording all the judicial guarantees.” *Id.* at 2795. The Convention’s Common Article 3, which does not define what comprises a “regularly constituted court,” left to the Court to infer the content from Convention commentary and customary international law; the Court held that it includes ordinary military courts, courts-martial. *Id.* Justice Kennedy, concurring, added that, because the military commission’s “review panel” is not a proper appeal that would protect the combatant’s fundamental rights, the commission lacked an important safeguard to assure accuracy and legitimacy. *Id.* at 2807 (Kennedy, J., concurring).

261. D. Arthur Kelsey, *The Architecture of Judicial Power: Appellate Review and Stare Decisis*, 45 JUDGES’ JOURNAL 6 (Spring 2006).

262. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (appeal inequalities may violate equal protection).

263. *Id.* at 79 (double security does violate equal protection).

264. Leubsdorf, *supra* note 204, at 628.

500 tortfeasor corporation—he referred to economic barriers to justice like filing fees, as well as to the lack of legal services to the poor and one-way attorney-fee shifting. A “right to appeal,” he argued, “would furnish a strong basis for decisions striking down financial barriers to appeals.”<sup>265</sup> And he emphasized the appellant’s constitutional rights. Referring to free speech, he wrote that “[a] defendant should . . . be guaranteed immediate recourse [to an appellate court] when the trial judge prohibits the exercise of what he claims are his constitutional rights.”<sup>266</sup> Professor Leubsdorf’s cogent remarks fail, however, to provide much direct support to a corporate TortCo that is encountering a financial barrier to an appeal because it will have trouble bonding Victor’s \$250 million judgment.

Fifth, direct holdings bearing on a trial court loser’s constitutional right to appeal are scarce because legislatures have guaranteed a civil trial loser’s appeal adequately and so securely that the appeal has not needed constitutional reinforcement. “Each of the fifty states (as well as the District of Columbia and the Commonwealth of Puerto Rico) maintains one or more appellate courts as part of its own independent judicial system, structured like a pyramid.”<sup>267</sup> The trial court loser, of course, must hew sedulously to the applicable rules statutes and court rules.

Beyond that, we turn to lower-case due process, policy arguments separate from constitutional law. A corporate judgment debtor like TortCo may be too “poor” to post the mandatory bond that guarantees that the plaintiff will be paid. TortCo may argue that a mandatory full-amount bond denies it a day in the appeals court and violates due process or equal protection. That defendant’s argument is really more for lower-case due process, that is for “fairness,” than for “unconstitutionality.” The tort reformer’s due-process argument for a capped-bond appeal is more attractive on lower-case due process or fairness grounds than on constitutional grounds. In other words, a tort reformer can argue more persuasively for a capped or limited bond to a rules committee or to a legislature than to a court.<sup>268</sup>

Appeals have two functions in our court system: first, the appellate

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265. *Id.* at 630.

266. *Id.*

267. DANIEL MEADOR, THOMAS BAKER & JOAN STEINMAN, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 2 (2d ed. 2006).

268. *See also* United States v. Krass, 409 U.S. 434, 446 (1973) (holding that an indigent filing for bankruptcy must pay filing fees); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (explaining that the state must waive filing fees for an indigent suing for divorce, because the state has a monopoly on granting a divorce).

court examines the lower court's decision for error, it reviews for correctness and, second, it develops, refines, and articulates the general principles that undergird our public values, it creates and maintains the common law. In the first instance, an appellate court's correctness review "assures litigants that the decision in their case is not prey to the failings of whatever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system."<sup>269</sup> Second, a common-law legal system requires appellate courts "to announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."<sup>270</sup>

The tort reformers' arguments for an appeal-bond cap invoke both these functions. If want of an appeal bond thwarts a defendant's appeal, that will perpetuate error and create unfairness. Witness *Loewen*.<sup>271</sup> The importance of an appeal to the reality and to our perception of justice done i.e., in lower-case due process, combines with the Supreme Court's augmented post-verdict judicial review of a plaintiff's punitive damages verdict<sup>272</sup> to comprise the strongest argument for an appeal-bond cap.

#### *D. Is Appeal-Bond Cap Legislation for Big Business Appropriate?*

The tort reformers had some obstacles to overcome. They represent big business, usually out-of-state corporations, a small group of a large-scale tortfeasors. Harry and Harriet Homeowner cannot identify with tort-reform proponents and say "TortCo could be denied review of its \$250 million punitive damages judgment and that just isn't fair. That could be us."

The tort reformers exploited the natural advantages of big business with a continuing interest in obviating a problem. Their arguments shift attention away from the defendant's tort, its misconduct. They focus on individual stories of hardship like that in the *Loewen* case. They tell a story of discrimination, potential hardship. Bad things happen to innocent businesses down in Tort Hell because of greedy trial lawyers, bent judges, and stampeded juries. This problem has the potential to

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269. PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL* 2 (1976).

270. *Id.* at 3. The authors strained to find a constitutional home base for an appeal, stating, "[t]rue, the constitutional status of the right to appeal is itself without express support; yet, within many, if not all, the imperatives we shall identify we discern elements of the constitutional concept of due process of law." *Id.* at 7.

271. See *supra* notes 167-172, and accompanying text.

272. See *supra* notes 59-67, and accompanying text, and notes 148-150, and accompanying text.

bankrupt a large employer and to affect the whole state.<sup>273</sup>

My own conclusions about the balance between the proponents and the opponents of appeal-bond caps are mixed. Many of the tort reformers' arguments are shopworn tort-reform rhetoric, ipse dixit, true only if believed. However, even though we cannot be positive that it will be "impossible" for TortCo to post a full-amount appeal bond and that, absent the amelioration of a cap, its "bankruptcy" will be imminent, a modicum of sympathy is appropriate. For a trial loser's appeal is a crucial component of lower-case due process that policymakers should foster and strive to protect.

Let's follow the bond-capping statutes from the legislatures to the courts where other tort-reform measures have been tested and some found unconstitutional.

## VI. IN THE COURT

We now turn from the arguments addressed to the legislatures regarding the merits of enacting appeal-bond cap legislation to whether that legislation, once enacted, can survive judicial scrutiny. In this section, I address whether judgment creditors will be successful in arguing to the courts that appeal-bond capping legislation is unconstitutional. Judgment creditors have three primary bases for attacking the statutes or rules: (1) the Full Faith and Credit Clause precludes a collection state, not the state in which the judgment was entered, from applying the collection state's appeal bond cap when the judgment creditor attempts to enforce the judgment; (2) the federal constitution's due process and equal protection clauses may invalidate the bond-capping legislation; and (3) state constitutional provisions, separate and apart from arguments under the federal constitution, may be used to invalidate the appeal-bond caps. As I detail within, appeal-bond cap legislation will survive challenges based on the federal constitution in virtually every instance. Further, some state constitution provisions provide a more fertile basis for attacking appeal-bond caps, but even these arguments will probably yield limited success.

To start with the defendant-appellant-judgment debtor's side, although an appeal bond puts a price on an appellant's quest for

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273. Rustad, *supra* note 148, at 1298-99. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WISC. L. REV. 71; Michael Rustad, *The Incidence, Scope, and Purpose of Punitive Damages: Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WISC. L. REV. 15.

appellate justice, if a state has a full-amount appeal bond provision, a judgment debtor appears to lack a constitutional right to a reduced bond.<sup>274</sup>

As discussed in Parts III-V of this article, although the constitution does not compel a state to cap its appeal bond, many legislatures have done so. Viewing a cap from the plaintiff-judgment creditor's perspective, an appeal bond in a lower amount than the judgment has two consequences. First, it reduces the judgment creditor's economic settlement leverage on the judgment debtor. The objective observer will not deplore this diminution. Second, it creates somewhat more of a risk than a full-amount bond that a judgment creditor will not be paid. At this writing, we have no evidence that appeal-bond caps have resulted in nonpayment of judgments.

With these issues in mind, I turn to the final major undertaking of this article: analyzing whether a state's appeal-bond cap is unconstitutional. The state's bond cap is, as I will examine below, probably constitutional. In reaching this conclusion, I explore the following issues: (A) the technical and difficult issues regarding the Full Faith and Credit Clause; (B) due process and equal protection arguments under the federal constitution; and (C) arguments available under state constitutions.

#### *A. Federal Full Faith and Credit*

Several lawyers and law professors said that the tobacco states' first wave of appeal-bond caps violated the Full Faith and Credit Clause or were otherwise unconstitutional in unspecified ways.<sup>275</sup> They were wrong. Examining this subject will take more ink than due process and equal protection below because full faith and credit is a complex and

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274. *Lindsey v. Normet*, 405 U.S. 56, 78 (1972); *Louisville & Nashville Ry. v. Stewart*, 241 U.S. 261, 263 (1916); *Hampshire Vill. Assocs. v. Dist. Court*, 408 N.E.2d 830, 833 (Mass. 1980). In *Henry v. First National Bank of Clarksdale*, the federal court of appeals affirmed a federal preliminary injunction that barred state-court plaintiffs from enforcing a state injunction and collecting the accompanying damages judgment from the federal plaintiffs who were civil rights organizations and active members. 595 F.2d 291, 294, 309 (5th Cir. 1979). The court hinged the *Henry* decision on the federal plaintiffs' free speech rights, not on due process. *Id.* at 302-05. Moreover, as I noted earlier, *Henry* was a civil-rights era decision that would probably not be decided the same way today. See *supra* note 72. But see, Professor Elaine Carlson maintaining that a judgment debtor could have a right to an unbonded or limited-bond appeal under a state constitutional provision providing for "open courts." Carlson, *supra* note 27, at 43-49. Professor Laycock commented on Professor Carlson's suggestion by observing that the Texas open-court provision resembles due process. Laycock, *supra* note 27, at 523-24.

275. Finch, *supra* note 27, 504-05 (quoting several).



arcane subject.

As detailed in Part III of this article, Virginia's legislature and other "tobacco" states' legislatures passed the first wave of bond caps after the Florida jury's verdict for \$145 billion in *Engle*. The legislatures' purpose was to protect the *Engle* defendants' assets in their respective states. In Florida, the capped appeal bond facilitated the defendants' direct appellate review of the judgment which was eventually successful.<sup>276</sup>

In Virginia and the other first-wave states, the legislatures' chief goal was to protect *Engle* defendants' assets in their states after defendants' direct review in the Florida system was exhausted, that is during the Florida judgment creditors' actions in their respective states to collect the Florida judgment from the defendant's local assets. At this writing several years later, the *Engle* judgment has just been resolved in defendants' favor on direct appeal in Florida. So the legislatures' haste to pass the first-wave appeal bond caps and to amend their foreign-judgments statutes turned out to have been an unnecessary precaution.

Even though the Florida courts reversed the *Engle* verdict, the specter of huge punitive damages verdicts continues to haunt the tobacco companies.<sup>277</sup> Modifying *Victor v. TortCo* slightly produces a scenario in which an *Engle*-type verdict is affirmed. Suppose Victor's \$250 million judgment against TortCo survives post-verdict judicial review in Florida, the judgment-rendering state. Suppose further that Victor, a plaintiff-judgment creditor, has prevailed in Florida on TortCo's direct appeal and the United States Supreme Court has declined review. TortCo's corporate headquarters are in the sister state of Virginia, and TortCo has other assets there. Victor, the judgment creditor, now seeks to collect from the judgment debtor's assets in Virginia, a state with a bond cap. In other words, Victor will be collecting her \$250 million Florida punitive damages judgment from TortCo's assets in Virginia.

What Full Faith and Credit Clause issues grow out of the application of Virginia's bond cap when a sister-state judgment creditor seeks to collect her Florida judgment from the judgment debtor's domestic Virginia assets?<sup>278</sup> The example presents a Florida state court judgment with collection on the judgment to proceed in a Virginia state court. Two other possibilities for a Florida judgment creditor are: (1)

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276. See *Engle*, 2006 WL 3742610, at \*22.

277. See *supra* notes 84-90 and 97-98, and accompanying text, and *infra* note 351, and accompanying text.

278. WILLIAM REYNOLDS & WILLIAM RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2005).

Victor could file a Florida state court judgment in Virginia federal court;<sup>279</sup> or (2) Victor could file a Florida United States District Court judgment in Virginia federal district court.<sup>280</sup> The analysis does not vary.

### 1. Procedure for Collecting on a Judgment in a Sister State

Let's trace the procedure beginning with Victor's verdict in Florida state court and ending with Victor's attempt to collect from TortCo's assets located at its corporate headquarters in Virginia. After the Florida jury's \$250 million verdict, the litigants' most important stay and appeal activity will occur in the judgment-rendering state, Florida. A Florida money judgment that is not final there because it is undergoing direct review in the trial court or is subject to appeal or being reviewed on appeal is not entitled to full faith and credit in Virginia.<sup>281</sup> Under full-faith-and-credit doctrine, Florida law governing stays and appeals determines the effect the judgment will eventually have in Virginia.<sup>282</sup>

Moreover, according to Virginia's appeal-bond statute, a judgment creditor like Victor cannot collect a Florida damages judgment in Virginia if the judgment creditor has appealed in Florida and furnished the security that state's law requires.<sup>283</sup> Virginia's bond-capping legislation will come into play if, after the Florida jury's verdict, the Florida trial judge, both the Florida appellate courts, and perhaps the United States Supreme Court affirm the verdict and render judgment on it. After the Florida judgment becomes final or otherwise collectable under Florida's law, Victor will first realize on TortCo's (capped) Florida appeal bond and employ other collection techniques against TortCo's Florida assets, if any. Then she may bring the Florida judgment to Virginia to seek to collect the deficiency from the judgment debtor's assets in Virginia.

Virginia's Uniform Enforcement of Foreign Judgments Act (UEFJA) has straightened and smoothed the judgment creditor's legal road to collection in Virginia. The judgment creditor's procedure in the

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279. For a federal court giving full faith and credit to a state court judgment under 28 U.S.C. § 1738, see *Jaffe v. Accredited Surety and Casualty Co., Inc.*, 294 F.3d 584, 590 (4th Cir. 2002).

280. RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.8, at 453-456.

281. *Id.* § 8.5(D), at 439; William Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 419-21 (1994).

282. RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.2, at 429; Reynolds, *supra* note 281, at 417.

283. VA. CODE ANN. § 8.01-465.4 (2000). See also, Carlson, *supra* note 27, 59 (explaining that under the UEFJA a judgment creditor may not file an out-of-state judgment if the judgment debtor has an appeal pending or bonded in the judgment state).

Virginia trial court is more like an administrative procedure than a lawsuit.<sup>284</sup> When Victor properly files, docket, or registers an authenticated copy of the final Florida judgment with the circuit clerk in a Virginia court, that creates the equivalent of a domestic Virginia judgment which triggers Virginia collection techniques.<sup>285</sup> In short, the Florida (or other sister-state) judgment becomes a Virginia judgment when the judgment creditor files it properly in the circuit clerk's office.

The Virginia court will apply the United States Constitution's Full Faith and Credit Clause and will accord the Florida judgment the same preclusive or *res judicata* effect that a Florida court would. The date that the judgment creditor files a sister-state judgment in Virginia is the equivalent to the date a Virginia judgment is entered.

The collection procedures under Virginia law then apply. Twenty-one days after filing and notice, the Virginia circuit clerk may issue the judgment creditor's writ of execution.<sup>286</sup> The Virginia court will notify TortCo, the judgment debtor, that its judgment creditor has filed the Florida judgment.

During the 21-day period before the judgment creditor's Virginia execution issues, the judgment debtor may interpose defenses and file motions. One judgment debtor, for example, challenged a sister-state judgment with a motion to vacate, a motion to stay collection, and a motion to discharge judgment liens.<sup>287</sup> The appeal bond and stay permitted under Virginia law to TortCo as a judgment debtor enter during this period.<sup>288</sup> When Victor files her Florida judgment in Virginia, TortCo is entitled to the Virginia cap on Virginia appeal bond security.<sup>289</sup> Thus, once the Florida damages judgment becomes final, TortCo may file a Virginia appeal bond to secure "satisfaction of the judgment," unless the statutory cap of \$25 million reduces the amount.<sup>290</sup> The judgment creditor's collection of the Florida judgment in Virginia will be stayed the same way a Virginia judgment would be stayed.<sup>291</sup>

But suppose the Virginia trial judge rejects TortCo's motions.

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284. RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.3, at 430.

285. VA. CODE ANN. § 8.01-465.2 (2000 & Supp. 2005).

286. VA. CODE ANN. § 8.01-466 (2000); RENDELMAN, ENFORCEMENT, *supra* note 21, § 2.2(A).

287. *Nastro v. D'Onofrio*, 822 A.2d 286, 289 (Conn. App. Ct. 2003).

288. VA. CODE ANN. § 8.01-465.4 (2000 & Supp. 2005).

289. VA. CODE ANN. § 8.01-465.4 (2000).

290. VA. CODE ANN. § 8.01-676.1(C), (J) (2000 & Supp. 2005).

291. VA. CODE ANN. § 8.01-465.2 (2000 & Supp. 2005); RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.3.

TortCo's appeal to the Virginia Supreme Court appears to lie from the trial judge's decision denying its motion or motions. The judgment debtor's bond should stay the judgment creditor's collection during the appeal.

## 2. What Defenses Can the Judgment Debtor Assert?

In the judgment creditor's streamlined UEFJA collection procedure in the Virginia courts, the judgment debtor has few defenses. The defenses available to a judgment debtor to a judgment creditor's collection of a final sister-state judgment are satisfaction, lack of jurisdiction, and rare types of fraud in its procurement.<sup>292</sup>

Full faith and credit is a powerful doctrine. Under full faith and credit, one creative collection-state court limited the effect of the collection state's rules for reopening a domestic judgment. The collection-state court, that court held, will only consider the judgment debtor's constitutional defenses from the judgment state; these defenses are absence of personal and subject-matter jurisdiction and lack of due process. As between full faith and credit and the collection state's statutes for reopening a domestic judgment, the collection-state court will follow full faith and credit making it easier to collect a sister-state judgment than a domestic one.<sup>293</sup>

Since the collection state, here Virginia, will accord the Florida judgment the same preclusive effect that the Florida court would, two defenses that are not available to the judgment debtor are that the Florida judgment is incorrect or that it is contrary to Virginia public policy.<sup>294</sup>

One full-faith-and-credit defense related to punitive damages

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292. RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.5(A); Reynolds, *supra* note 281, at 422-30.

293. Nastro v. D'Onofrio, 822 A.2d 286, 293 (Conn. App. Ct. 2003).

294. Fautleroy v. Lum, 210 U.S. 230, 237 (1908); Nastro, 822 A.2d at 292-93; RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.6(B); REYNOLDS & RICHMAN, *supra* note 278, at 70-72; Reynolds, *supra* note 281, at 436. This crucial point is often missed. See Johnson v. Johnson, 849 N.E.2d 1176 (Ind. Ct. App. 2006) (stating incorrectly that a collection state will give Full Faith and Credit to a sister-state judgment unless the judgment-state law violates the forum's public policy). The point is, however, crucial: a judgment creditor's collection of a foreign-nation judgment in the United States differs; not bound by the Full Faith and Credit Clause, a court in the United States will decline recognition to a judgment creditor with a foreign-nation judgment that is based on substantive law repugnant to the forum's public policy, the defense that the Full Faith and Credit Clause forbids to a sister-state judgment. ALI/UNIDROIT, *supra* note 12, at 155-56. For a discussion of punitive damages judgments between nations, see Ronald Brand, *Punitive Damages Revisited, Taking the Rationale for Non-Recognition of Foreign Judgments Too Far* (Univ. of Pitt. School of Law, Working Paper Series No. 26, Aug. 2005), available at <http://law.bepress.com/pittlwps/papers/art26>.

warrants a brief treatment here. In Virginia, a judgment debtor like TortCo may attempt to bar a judgment creditor from collecting a sister-state, Florida, punitive damages judgment by arguing that the Virginia court should refuse full faith and credit to a punitive damages judgment because punitive damages are “penal.”

The Virginia court should reject the judgment debtor’s argument that a plaintiff’s punitive damages judgment is “penal.” Although a court need not extend full faith and credit to an out-of-state “penal” judgment, the Virginia court ought to define “penal” narrowly to exclude punitive damages for full faith and credit purposes. For a sister-state judgment to be “penal,” (1) its “purpose must be to punish [the defendant], rather than to recompense [the plaintiff],” and (2) “the recovery must be in favor of the state, not a private individual.”<sup>295</sup> One purpose of punitive damages is to punish, but to satisfy the “penal” test, the plaintiff must also be the government. If a judgment creditor like Victor who is a private individual seeks to collect a sister-state’s judgment for punitive damages, the Virginia court should reject the judgment debtor’s “penal” argument, grant the judgment full faith and credit, and domesticate it forthwith.<sup>296</sup>

Indeed, more than 30 years ago, the Florida court gave the punitive damages portion of a Texas judgment full faith and credit, rejecting the Florida judgment debtor’s argument that punitive damages were “penal.”<sup>297</sup> Two United States states whose “domestic” jurisprudence rejects common law punitive damages, Louisiana and Nebraska, have, in fact, extended full faith and credit to sister-state judgments that included punitive damages.<sup>298</sup> Moreover, full faith and credit to a sister-state judgment for punitive damages is more clearly appropriate if, like the judgment-rendering state, Florida, the collection state, Virginia, has common law jurisprudence that includes, as does Virginia’s, punitive damages.<sup>299</sup>

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295. REYNOLDS & RICHMAN, *supra* note 278, at 95-97; Reynolds, *supra* note 281, at 435.

296. RENDLEMAN, ENFORCEMENT, *supra* note 21, § 8.6(B). See also, *Nastro v. D’Onofrio*, recognizing an out-of-state judgment for discovery sanctions, not challenged as penal. 822 A.2d at 289. Several states have diversion or split-recovery systems that carve a share out of a plaintiff’s punitive damages judgment and turn it over to the government. The government’s share of a plaintiff’s punitive damages judgment seems “penal” under the definition in the text, and a sister-state should not accord it full faith and credit. Although I found no direct precedent, support comes from *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1577-78 (M.D. Ga. 1990), and *Republic of Philippines v. Westinghouse Electric Corp.*, 821 F. Supp. 292, 297 (D.N.J. 1993).

297. *Holbein v. Rigot*, 245 So. 2d 57, 61 (Fla. 1971).

298. *Ault v. Bradley*, 564 So. 2d 374 (La. App. 1990); *Miller v. Kingsley*, 230 N.W.2d 472 (Neb. 1975). See also Finch, *supra* note 27, at 556 n.327.

299. JOHN COSTELLO, VIRGINIA REMEDIES § 21.08 (3d ed. 2005).

A contrary statement that appears in Judge W. Fletcher's 2006 opinion for the en banc Ninth Circuit in *Yahoo! Inc. v. La Ligue Contre Le Racism et L'Antisemitisme* should not alter the conclusion that punitive damages do not fall within the "penal" judgment exception to the full faith and credit owed to a sister state's judgment.<sup>300</sup> In dicta, in a part of his opinion that failed to garner a majority, Judge Fletcher wrote, "Thus, for example, an American court is not required to enforce an order of contempt or an award of punitive damages in a civil action."<sup>301</sup> Two decisions are cited. The first citation is to dicta in a family-support contempt: "Other jurisdictions are reluctant to give full faith and credit to an order for contempt due to its punitive nature."<sup>302</sup> This first citation does not involve punitive damages at all. The second citation is to a choice-of-law decision in which the court declines to choose a foreign nation's punitive sanction on the ground that it is contrary to forum public policy.<sup>303</sup> This second citation involves a court's initial choice of substantive law, neither a final judgment nor full faith and credit.<sup>304</sup> Indeed, in a footnote, the second court says that a state of the United States will allow a judgment creditor to collect a sister-state judgment for punitive damages.<sup>305</sup>

Last, Judge Fletcher quotes a Comment from the Foreign Relations Restatement that also uses the word "state" to refer to other nations rather than to a state of the United States. "Some states consider judgments penal for purposes of non-recognition if multiple, punitive, or exemplary damages are awarded, even when no governmental agency is a party."<sup>306</sup> The reader learns from the context that the Restatement Comment is using "states" to mean other nations, not other states within the United States.<sup>307</sup> After a cross reference, the following sentence removes any doubt that remains: "In the United States, such judgments are not considered penal for this purpose."<sup>308</sup> Thus, nothing in Judge Fletcher's *Yahoo!* opinion shakes my conclusion that a sister-state judgment for punitive damages is entitled to full faith and credit in a

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300. *Yahoo! Inc. v. La Ligue Contre Le Racism et L'Antisemitisme*, 433 F.3d 1199, 1219 (9<sup>th</sup> Cir. 2006).

301. *Id.*

302. *Id.* (quoting *Frank v. Reese*, 594 S.W.2d 119, 121 (Tex. Civ. App. 1979)).

303. *See id.* (citing *Republic of Philippines v. Westinghouse Electric Corp.*, 821 F.Supp. 292, 295 (D.N.J. 1993)).

304. *Id.*

305. *Republic of Philippines*, 821 F.Supp. at 295 n.3.

306. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 Cmt. b. (1987).

307. *Id.*

308. *Id.*

state court within the United States.

### 3. Full Faith and Credit and Appeal-Bond Caps

Virginia's appeal-bond-capping statute treats domestic Virginia and sister-state judgments the same.<sup>309</sup> It does not, on its face, discriminate. Under Full Faith and Credit Clause doctrine, the collection-state court applies its own procedure. As the Supreme Court recently emphasized:

Full faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.<sup>310</sup>

This language appears to cover procedure like a state's appeal-bond cap.

A Virginia Supreme Court decision, citing Virginia use of Virginia procedure, allowed a Virginia court to apply a shorter Virginia statute of limitations to an out-of-state judgment than the statute of limitations on a Virginia judgment.<sup>311</sup> If this decision governs appeal bonds, which are also procedural, then the cap, which applies to both domestic and out-of-state judgments, double times past constitutional muster.<sup>312</sup>

In our *Victor v. TortCo* scenario, both Florida and Virginia have capped their appeal bonds. Virginia, as a collection state, may, consistently with the Full Faith and Credit Clause, apply its bond cap to a judgment creditor's suit to collect a Florida judgment as part of Virginia's domestic procedure. A collection state with a capped appeal bond may apply its own procedural cap to a judgment from another state that lacks a cap.<sup>313</sup> Finally, if the judgment state has capped the appeal bond but the judgment creditor seeks to collect it in a state without a cap, the collection state may follow its own procedure and require a full-amount bond.

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309. VA. CODE ANN. § 8.01-676.1(J) (2000 & Supp. 2005).

310. *Baker v. General Motors*, 522 U.S. 222, 235 (1998).

311. *Carter v. Carter*, 349 S.E.2d 95 (Va. 1986).

312. There was some grumbling that the court may have decided *Carter* incorrectly. RENDELMAN, ENFORCEMENT, *supra* note 21, § 8.7(A). Moreover, in 2005, the Virginia General Assembly (1) repealed § 8.01-252, the separate ten-year statute of limitations for sister-state and foreign-nation judgments; and (2) provided that sister-state and foreign-nation judgments are subject to the twenty-year limitations period for a Virginia judgment in § 8.01-252.

313. Finch, *supra* note 27, at 506-07.

#### 4. Full Faith and Credit Summary

In judgment creditor Victor's full-faith-and-credit proceeding in a Virginia court on a fully-trying Florida tort judgment, which the Florida courts have affirmed on appeal, judgment debtor TortCo's collateral attack has only a remote possibility of success.<sup>314</sup> A Virginia court could appropriately apply the Virginia appeal-bond cap to a Florida punitive damages judgment.<sup>315</sup>

A state's appeal-bond cap coupled with an amended UEFJA do not appear to violate the Full Faith and Credit Clause when applied to its court's recognition of a sister-state judgment for compensatory damages or punitive damages. A state's appeal-bond cap and UEFJA treat an out-of-state judgment the same as a domestic judgment. Moreover, since both are procedural, they are appropriate under the full-faith-and-credit doctrine that the enforcement state will apply its own procedure in a judgment creditor's proceeding to collect an out-of-state judgment from the judgment debtor's local assets. The foregoing should hold even if the judgment state lacks an appeal bond cap but the enforcement state has one.

As set forth in Part IV, above, the second wave appeal-bond capping statutes, including Virginia's, that apply to all large judgments treat all large judgments the same. Treating punitive damages and compensatory damages the same reduces discrimination that may be subject to a judgment creditor's challenge under a state or federal equal protection clause.

Although an appeal-bond cap does not violate the Full Faith and Credit Clause, in a Florida judgment creditor's UEFJA action in Virginia to collect a Florida judgment for punitive damages, Virginia's capped appeal bond will probably neither last very long nor make much difference since the issues that can be litigated in the collateral proceeding are limited.

#### *B. Federal Due Process and Equal Protection*

The rest of my constitutional analysis will be shorter and more straightforward. Suppose that, after the jury returns the \$250 million punitive damages judgment, TortCo posts an appeal bond that is capped at \$25 million under state law. Then Victor files a motion for a declaratory judgment that the bond cap rule or statute is unconstitutional

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314. RENDELMAN, ENFORCEMENT, *supra* note 21, §§ 8.3, 8.4, 8.5.

315. Finch, *supra* note 27, at 518-19.



and for an order requiring the defendant to post a full-amount bond. Victor may pursue its arguments under the federal constitution and under the applicable state constitutions.

A United States court's constitutional review of most state statutes under the Equal Protection and Due Process Clauses of the federal constitution is subject to rational-basis review. The court will ask first whether the legislation is "economic regulation" and, if so, whether the legislature had a "rational basis" for the legislation. A court's rational-basis review of a state's economic legislation is permissive, a form of "anything-goes" review. For example, in a short opinion in *Smith v. Botsford General Hospital*, the Sixth Circuit Court of Appeals held, under rational-basis review, that controlling health-care expense justified a cap on a medical malpractice plaintiff's "noneconomic" damages.<sup>316</sup>

I conclude that a legislature has a "rational basis" to enact an appeal-bond cap. A legislator could think, among other things, that a bond cap would preserve a defendant's constitutionally mandated post-verdict judicial and appellate review of punitive damages under *Gore* and *Campbell*.<sup>317</sup> On this new subject, I was not surprised to find direct precedent lacking.<sup>318</sup>

### C. State Constitutional Protections

Plaintiffs have assailed state tort-reform measures under state constitutions with mixed success.<sup>319</sup> Each state has its own constitution, legal culture, set of legislative-judicial relationships, and history of tort reform. Although the states' constitutions contain many similar provisions, each state's courts have the last word on what its separate constitution means. Having said that, I will summarize several recent state constitutional decisions dealing with caps on a plaintiff's damages and speculate about how an appeal-bond cap would fare.

Tort reform in the form of an appeal-bond cap may be more acceptable than other tort reform legislation that caps damages. Unlike a

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316. *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519-20 (6th Cir. 2005).

317. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

318. *Cf. Laycock, supra* note 27, at 509 (explaining that the appeal bond is very likely not a denial of due process or equal protection.).

319. *Compare* *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43, 77-78 (Neb. 2003) (total cap on damages not unconstitutional), *with* *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (selective cap on pain and suffering unconstitutional). These contrasting decisions are discussed below. For a summary of state constitutional law dealing with tort reform, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* Ch. 6 (4th ed., Michie 2006).

tort-reform statute that places a cap on a plaintiff's recovery of compensatory damages and pain-and-suffering damages, an appeal-bond cap on a punitive-damages judgment neither singles out the most seriously injured for reduced compensation nor erodes the state's compensation policy. The appeal-bond cap, by contrast, by facilitating appellate review of a punitive damages verdict, may lend credibility to the state's retributive policy and stamp the imprimatur of legitimacy on the jury's verdict. Moreover, the appeal-bond cap facilitates the judicial review that the Supreme Court has mandated for a punitive damages verdict.<sup>320</sup> A cap on an appeal bond for a compensatory damages judgment, which was included in some second-wave legislation, however, is more difficult to justify than one on punitive damages.

### 1. Rational-Basis Review Under State Constitutions

Under a state's constitutional rational-basis review that resembles the federal courts' "anything-goes" rational-basis review, a tort reform statute is economic legislation—the legislature could conclude that, in addition to facilitating the defendant's appellate review, an appeal-bond cap preserves the state's business climate, fosters its economic development, and maintains public confidence in its judicial system.<sup>321</sup> That would preserve the reform under state rational-basis review.

At least one state does not subscribe to rational-basis, anything-goes review. The Wisconsin Supreme Court in *Ferdon v. Wisconsin Patient Compensation Fund*, applied an equal-protection rational-basis-with-teeth standard of review.<sup>322</sup> Under this standard, the *Ferdon* court struck down a state cap on a plaintiff's pain and suffering or "noneconomic" damages for medical malpractice.<sup>323</sup> The court's majority found that rational basis with teeth was a sufficiently capacious standard to allow it to scrutinize the factual basis for the arguments that tort reformers had adduced in the legislature to support enactment of the damages cap.<sup>324</sup> The court did not find that the tort reformers' arguments for the cap were persuasive enough to justify the effect that the cap had on the disfavored group—the most seriously injured tort victims.<sup>325</sup>

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320. *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

321. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 16 (N.C. 2004).

322. *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 461 (Wis. 2005).

323. *Id.* at 489.

324. *Id.* at 460-61.

325. *Id.* at 485. See *Dorwart v. Caraway*, 58 P.3d 128, 142-48 (Mont. 2002) (Nelson, J., concurring) (putting forth two reasons for a state court to construe its state constitution boldly and

It is not clear, however, that a court employing the Wisconsin court's rational-basis-with-teeth standard would void an appeal-bond cap. An appeal-bond cap facilitates the defendant's appeal and the appellate courts' review even as it reduces plaintiff's settlement leverage and raises some risk that she will not collect all of her judgment.<sup>326</sup> Although plaintiff's judgment may be for compensatory damages, which are the court's redress to reimburse the plaintiff for the loss the defendant caused, the judgment may also include a substantial punitive damages component which is subject to fairly vigorous review under the Due Process Clause. Arguments to void the appeal-bond cap on punitive damages would, thus, be less compelling than the arguments against the compensatory damages at issue in *Ferdon*. A cap on an appeal bond for compensatory damages would, however, be more vulnerable than one on punitive damages.

## 2. Special Legislation Clauses

"Special legislation" clauses that appear in many state constitutions provide a second avenue for attacking appeal-bond cap legislation under state constitutions. In a 2003 decision on legislation imposing an absolute cap on all of a plaintiff's damages for medical malpractice, the Nebraska court stated that the special legislation clause protects against dispensing special favors: "It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted."<sup>327</sup>

An appeal-bond cap is a special privilege for a defendant that a jury has found to have committed an expensive tort. This article has speculated about some of the reasons for a state legislature to pass an appeal-bond cap.<sup>328</sup> The cap, in addition to reducing the judgment creditor's settlement leverage, creates some risk that a judgment creditor will not collect her judgment. It also treats a judgment debtor of a huge judgment differently than a judgment debtor of a lesser amount. Is an appeal-bond cap arbitrary or unreasonable enough to flunk a state

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independently: first, state constitutions contain provisions to protect individual's privacy and right-to-remedy and to require open courts not found in the United States Constitution; and second, the United States Supreme Court is in retreat and diluting the United States Constitution's protection of individual rights).

326. A statute that requires a full-amount bond for a judgment debtor that is dissipating assets ameliorates the plaintiff's risk of not collecting somewhat, but probably does not eliminate it.

327. *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43, 65 (Neb. 2003).

328. *See supra* Part V.

constitution's special-legislation provision? Does the public policy of facilitating the judgment debtor's appellate review of a large judgment overcome the judgment creditor's risk of nonpayment and the distinction between a huge and a less large judgment?

In Nebraska, the answer to the first question is probably "no," and the answer to the second question is probably "yes." In other words, the appeal-bond cap would probably survive. The Nebraska courts have defined a fairly quiescent standard for reviewing a statute for compliance with the special-legislation provision in the state's constitution:

If the Legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified.<sup>329</sup>

"It is commonly held that courts will not reexamine independently the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of the statute. . . . This court does not sit as a superlegislature to review the wisdom of legislative acts."<sup>330</sup>

Under the Nebraska court's permissive special-legislation standard, if the legislature's policy were to facilitate appellate review of a large judgment for either punitive damages or compensatory damages, the state supreme court would be likely to decline to disapprove it.

Other states may use a less permissive review standard. For example, a judgment creditor's attack on a judgment debtor's bond cap as unconstitutional special legislation might fare better in another Midwestern state, Illinois. That state's supreme court has held that a cap on "noneconomic" damages was arbitrary enough to be special legislation because of the lack of solid evidence to support the cap and because of its effect of under-compensating a seriously injured plaintiff.<sup>331</sup> Under this standard, would an appeal-bond cap flunk the Illinois court's special-legislation test? Don't bet the farm. An appeal bond cap only creates a risk of non-payment. The damages that the cap affects may be punitive, not compensatory, damages. And the court may require a judgment debtor that is dissipating its assets to post a full-amount bond.

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329. *Gourley*, 663 N.W.2d at 68.

330. *Id.* at 68.

331. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1075-78 (Ill. 1997).

*D. The Vulnerability of Appeal-Bond Caps*

The first-wave caps on only punitive damages will more readily survive constitutional scrutiny than the second-wave caps that include compensatory damages. Critically, since punitive damages are imposed to punish, not compensate, the Supreme Court has held that a punitive damages defendant is entitled to more careful post-verdict judicial review.<sup>332</sup> A punitive-damages plaintiff receives consequently less judicial commiseration. This will afford judgment debtors a strong argument in the courts.

The most vulnerable appeal-bond caps, it seems to me, are the targeted ones: (1) a bond cap for a MSA or other favored defendant but not for another large-judgment defendant and, (2) a variation, a more beneficial bond cap for a MSA or other favored defendant than for another defendant.<sup>333</sup> The statutes treat a MSA large-verdict defendant better than another large-verdict defendant. Suppose a defendant in a medical malpractice suit seeks the benefit of the cap when it appeals a large judgment. Does a MSA-only appeal-bond cap violate a state constitution's equal protection or special legislation provisions? Under rational-basis, anything-goes review, does a legislature act on a rational basis by protecting the state government's stream of MSA payments? Probably.<sup>334</sup>

Even under Professor John Goldberg's "public law" view of torts and tort reform, an appeal-bond cap will probably pass constitutional muster. Professor Goldberg views tort law as a law that guarantees a plaintiff's right to redress. There is, he writes, "a special set of due process rights that entitle individuals to certain governmental structures and certain bodies of law."<sup>335</sup> Thus, a tort plaintiff has a due process right to a legal system that allows redress for a tortfeasor's wrong. She should, Professor Goldberg maintains, be able to sue a wrongdoer to vindicate her rights and interests to secure redress from a tortfeasor who

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332. See *supra* notes 59-67 and 148-150, and accompanying text.

333. See *supra* notes 134-138, and accompanying text.

334. But I am holding my nose. Even if the MSA-sheltering statutes are not unconstitutional, they shine a spotlight on the state governments' addiction to the stream of MSA revenue from tobacco that augments their taxes on tobacco. The victims of this misalliance around brisk sales of cigarettes are the present and future smokers themselves who support the state governments directly through taxes and indirectly through the tobacco companies and the MSA; these are mostly low income people many of whom die prematurely from smoking-related maladies. MATTHEW A. CRENSON & BENJAMIN GINSBERG, *DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINED ITS CITIZENS AND PRIVATIZED ITS PUBLIC* 157-62 (2002) (discussing the Florida appeal-bond cap).

335. John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 625 (2005).

has wrongfully injured her.<sup>336</sup>

Professor Goldberg's analysis is balanced and contextual. He would support a decision that a total cap on damages like the Nebraska court approved in *Gourley*<sup>337</sup> is "odious," that is not constitutional. A targeted cap like the cap on a plaintiff's medical malpractice pain and suffering damages like the Wisconsin court struck down in *Ferdon*<sup>338</sup> would not be on its face unconstitutional. A court might, however, upset that targeted cap as applied to a homemaker or an elderly plaintiff because the cap would effectively eliminate the plaintiff's claim.<sup>339</sup>

Professor Goldberg's goal of securing a plaintiff's redress should include facilitating a plaintiff's collection of compensatory damages from a solvent defendant. The appeal-bond cap appears not to offend. Since we have no evidence that appeal-bond caps have prevented plaintiffs from collecting their judgments, the argument that a cap is improper seems, under this analysis, to be premature and perhaps strained.

## VII. SUMMATION

The appeal bond began its life as a servile drudge, a procedural technique to accommodate the judgment creditor's need to collect her judgment promptly with the judgment debtor's conflicting need for judicial review. Plaintiffs' huge punitive damages verdicts transformed it. I have used Victor's products liability judgment regarding a Gizmo gone awry for \$250 million, \$225 million of it punitive damages, as an example. Many recent mega-verdicts were entered in smokers' lawsuits against tobacco companies. Tobacco companies and actual and potential defendants with exposure to enormous verdicts convinced state legislatures to perceive uncapped appeal bonds as a menace to orderly justice, to the defendants' solvency, and to their states' economies. The tort reformers' effort succeeded: two waves of tort reform statutes capped appeal bonds in well over half the states.

The states' appeal-bond capping statutes present problems of constitutional law that turn out to be more interesting than difficult. Because of states' streamlined procedure to collect a judgment, the effect of a state's cap on a large sister-state judgment will be neither protracted nor momentous. A state's capping statute is also likely, but

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336. *Id.* at 529.

337. *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43, 77-78 (Neb. 2003).

338. *See supra* note 301 and accompanying text.

339. Goldberg, *supra* note 335, at 621-22.

not certain, to pass the federal constitutional tests. Finally, the judgment creditor's possible state constitutional challenges to the caps will also probably fail; the observer can be confident, without being certain, that an appeal-bond cap will survive state constitutional testing in most states.

What advice do I have? A full-amount, no-discretion surety bond for an appeal is too rigid. More flexibility is needed because of at least four developments: huge businesses, consumer-protection punitive damages based on the defendant's wealth, plaintiff class actions for damages that aggregate thousands of plaintiffs' claims, and post-verdict judicial review of punitive damages based on the Due Process Clause. A superior procedure would start by presuming that an appellant will supply a full-amount surety bond for plaintiff's security; but it would also allow an appellant to show "good cause" as a prerequisite for the judge's discretion to vary the amount and form of security.

Should the appeal-bond statute include a cap? The need for the legislature to protect a defendant like TortCo that a jury has found to have been a grave tortfeasor under that state's or another state's law and liable to Victor for \$250 million punitive damages and compensatory damages may seem attenuated. Are the appeal-bond capping statutes this article has examined wise and expedient public policy? True special-interest legislation, an appeal-bond cap obviously protects an unlikely underdog; its chief beneficiary is a large-scale tortfeasor like TortCo. Is the apparent tortfeasor's difficulty of posting an appeal bond unworthy of the legislature's attention? Is an appeal-bond cap special justice for the undeserving rich?

How does an appeal-bond cap affect the plaintiff? By facilitating defendant's appeal, a cap will tend to protract the process, delay that favors the defendant. A cap will alter the parties' strategies for negotiating a settlement after a plaintiff's verdict; but the plaintiff who loses this economic leverage is not losing legitimate pressure. A cap that does not cover all of plaintiff's judgment will reduce, in unknown ways, plaintiff's ability to collect her judgment.

Although several of the tort reformer's arguments for an appeal-bond cap are shaky, one has substance. The tort reformer's strongest argument is that an appeal-bond cap facilitates the defendant's appellate review. An appeal to correct trial errors and create legal precedent is an integral part of a system of justice that this article has called lower-case due process. "[J]ustice delayed is better than no justice at all . . . ."<sup>340</sup>

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340. Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 O.J.L.S. 235, 239 (2006).

How much facilitation is appropriate? Professor Finch suggested that a state legislature should abolish the appeal-bond requirement for a defendant's stay on a punitive damages judgment.<sup>341</sup>

My position is a middle one. An unbonded punitive-damages appeal discounts the jury's verdict and the plaintiff's apparent right to collect her money. A legislature might, however, under the aegis of protecting the plaintiff's interest as well, consider a generally applicable appeal-bond procedure like the original discretionary provisions that, if defendant demonstrates good cause, grants the judge case-by-case discretion in setting the amount and allowing alternative types of security.<sup>342</sup>

In a defendant's bet-the-company appeal where the plaintiff's judgment exceeds the defendant's assets, the judge might bond the appeal at the value of the defendant's assets.<sup>343</sup> Detouring a little from the cap, an appeal-bond statute should augment the judge's discretion by waiving an appeal bond for an indigent judgment debtor with neither money for a bond premium nor assets to dissipate during an appeal.<sup>344</sup>

The argument for a cap on a defendant's appeal bond for a plaintiff's punitive damages judgment is, on balance, persuasive. First, punitive damages are not compensatory, not needed to make the plaintiff "whole." Punitive damages fulfill a public purpose; they punish and deter actual and potential malefactors. Second, the Constitution commands a more rigorous post-verdict judicial review for punitive damages than for compensatory damages,<sup>345</sup> and a cap eases defendant's access to that appellate review where a high percentage of huge judgments for punitive damages will be reduced.

I have discovered no record of judgment debtors shielded behind appeal-bond caps evading payment to plaintiffs. If abuses arise, I will revisit this conclusion.

The tort reformers' arguments for an appeal-bond cap to ameliorate a defendant's appeal of a compensatory-damages judgment, however,

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341. Finch, *supra* note 27, at 525-27. See also Unif. Law Comm'rs' Model Punitive Damages Act § 13, 14 U.L.A 338 (2005).

342. See VA. CODE ANN. § 8.01-676.1(E)(2000 & Supp. 2005); Mark Kravitz, *Appellate Law: Stays Pending Appeal*, NAT'L L.J., April 2, 2001, at A10.

343. Laycock, *supra* note 27, at 515.

344. VA. CODE ANN. §8.01-676.1(N) (2000 & Supp. 2005). Professor Laycock's view is that a statute that requires an indigent to post a bond is "irrational." Laycock, *supra* note 27, at 515. A plaintiff that sues a defendant who lacks non-exempt assets to pay a judgment may also be "irrational." That "irrational" plaintiff may have sued to establish a principle; moreover as a judgment creditor, it may file a judgment lien in case the judgment debtor inherits land, and it ought to pay attention to whether its debtor wins the lottery.

345. See *supra* notes 59-67 and 148-150, and accompanying text.



fail to persuade me. The reasons I gave above to favor a cap on a defendant's bond on punitive damages are absent for a defendant's appeal of a plaintiff's verdict for the compensatory damages that ameliorate a tort victim's actual suffering.

What size of punitive damages verdict should lead to an appeal-bond cap? The list of verdicts in *The National Law Journal's* special section, "Verdict Search for The Top 100 Verdicts of 2005" lumps compensatory damages and punitive damages together.<sup>346</sup> A \$25 million cap on all damages would cap the first 68 verdicts on the 2005 list; a \$50 million cap the first 26; a \$100 million cap the first 16.<sup>347</sup> The accompanying story supplies the totals within the top 100 verdicts—"In 2005, punitive damages totaled \$3.5 billion, while nonpunitive damages equaled \$4.7 billion."<sup>348</sup>

Any specific figure that I recommend has an arbitrary quality. I suggest a \$25-50 million cap on a defendant's appeal bond for punitive damages.

My conclusions: The legislature should start with a presumptive full-amount appeal bond and (1) grant the trial judge discretion, if the appellant demonstrates good cause, to reduce any appeal bond or to provide alternative security; and (2) cap the appellant's appeal bond on a punitive-damages judgment, but not on one for compensatory damages, at \$25-50 million.<sup>349</sup>

When this article began, a jury had just rendered a verdict in favor of Victor and against TortCo, in the amount of \$250 million. Of that amount, \$225 million constituted punitive damages. Under the proposed legislation, if TortCo didn't show "good cause," TortCo's appeal would be bonded for the full amount of Victor's \$25 million compensatory damages, but the cap would limit TortCo's bond on the \$225 million punitive damages to either \$25 or \$50 million. Hoping that justice is done on appeal, we leave TortCo and Victor on the threshold of briefing and arguing the appeal.

For perspective after our long tour of Tort Hells, let's stroll through the Elysian Fields. Washington and Lee, where I work, is in Rockbridge County, Virginia. A conversation in early June, 2006, with Bruce

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346. *The Verdict Search 100*, NAT'L L.J., Feb. 20, 2006, at S2.

347. *Id.*

348. Jones, *supra* note 231, at S2. The trial verdicts in the list are subject to the trial judges' decision on defendants' post-trial motions; the trial judges may reduce or eliminate the verdicts before they ripen into appealable judgments.

349. The statute that comes the closest to the recommendation is Idaho's with the cap amount raised. IDAHO CODE ANN. § 13-202(2) (West, Westlaw through all 2006 laws of the 2d Reg. Sess. and 1st Ex. Sess., Ch. 1).

Patterson, Rockbridge County's Circuit Clerk, confirmed my impression that Rockbridge juries are, in Bruce's words, "tight-fisted." To begin with, the county has only a few civil jury trials every year, as of mid-June, only one in 2006, a dispute about a remodeling project run amok. Over half of Rockbridge jury verdicts favor the defense. Jury awards are usually "meds only," sometimes with lost wages. The reader will mark the scarcity of pain and suffering in the Elysian Fields. The largest Rockbridge jury verdict was in the \$400,000 range, and there have been only a few others in the \$100,000 range, one a death case.

Punitive damages are as scarce as hens' teeth in Rockbridge County. In his 28 years of attending jury trials in the county courthouse, Clerk Patterson does not remember a punitive damages verdict; if there has been one, it was not large.<sup>350</sup> Few civil cases are appealed; the Virginia Supreme Court, which has discretionary jurisdiction, denies most applications. Bruce has seen appeal bonds for costs, usually \$500, cash; but he does not remember approving a defendant-appellant's supersedeas bond to secure a plaintiff's verdict.

The verdicts and judgments that this article considered are the Big Ones, those extraordinary instances beyond normal experience that a social scientist would call "outriders." But a gargantuan jury verdict is an actual event that a procedural system must recognize and accommodate. I maintain that an appeal-bond cap on a defendant's appeal from a plaintiff's mammoth punitive damages judgment, although not required by constitutional Due Process, is a beneficial lower-case due process technique to facilitate a decision on the merits in the defendant's appeal and to bolster the integrity of the legal process.

Turning the kaleidoscope slightly in closing, I will inquire whether the tort reformers' accomplishments that I review above are merely successful skirmishes against an approaching endgame that will snuff out big tobacco. Although the auguries from the plaintiffs' failed class actions in *Engle* and *Price* point in the opposite direction,<sup>351</sup> the momentum from the individual smokers' lawsuits may portend an inexorable denouement for a product that lacks positive attributes. If so, appeal-bond caps will facilitate tobacco defendants' post-verdict judicial review of jury verdicts; they will prolong the courts' deliberations and delay the plaintiffs' collection; but the caps will also assist the legal system in securing accurate decisions and public acceptance.

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350. Rockbridge County's dearth of punitive damages verdicts was excluded from a recent study of punitive damages which featured only populous counties. Eisenberg, *supra* note 101.

351. *But see*, Schwab v. Philip Morris, 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying a class of "light" cigarette smokers).

Concluding his *Ages of American Law*, Grant Gilmore observed that “[i]n Hell there will be nothing but law, and due process will be meticulously observed.”<sup>352</sup>

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352. GRANT GILMORE, *AGES OF AMERICAN LAW* 111 (1977).