

CAMPAIGN For TOBACCO-FREE Kids[®]

THE BIG CIGARETTE COMPANIES' PUSH FOR APPEAL BOND CAPS

When defendants lose a lawsuit and are required to pay monetary damages to plaintiffs, in most cases they must post a bond or other security before they are allowed to appeal the adverse ruling to a higher court. This appeal bond is meant to protect the plaintiffs by ensuring that funds will be available to pay the judgment amount if it is upheld on appeal. Without an appeal bond, losing defendants could delay payments (at no cost) and also waste, hide, or otherwise protect their assets during the appeal process. Such appeal bonds have traditionally been set at the same amount as the monetary judgment against the defendants, plus costs and interest. In recent years, however, the big cigarette companies have been supporting legislation to change the appeal bond requirements, typically by setting a maximum amount or cap of \$100 million or less (when judgments against the cigarette companies can be in the billions). Many states have already passed these appeal bond caps, despite the following problems.

- The traditional appeal bond requirements that set the appeal bond at an amount equal to the monetary judgment amount have been working fine for decades.
- Cigarette companies that are found liable for causing enormous amounts of personal harm already enjoy a number of protections against large monetary judgments or related large appeal bond requirements, including: a) the recent U.S. Supreme Court ruling restricting the size of punitive damages; b) state and federal laws that make certifying plaintiff classes in attempted class-action lawsuits against the companies difficult; c) new state laws making product liability lawsuits more difficult or limiting the damages that can be collected through such lawsuits; and d) court rulings that appeal bond requirements cannot be set at levels that would force a losing defendant wishing to appeal into bankruptcy or out of business.¹
- The proposals to change the long-standing appeal bond requirements in various states have been prompted by major cigarette companies that are trying to obtain special protections against large judgments against them. In fact, some of the proposals apply the appeal bond caps only in cases with monetary judgments against tobacco companies.
- To date, there has not been any lawsuit where a major cigarette company was not able to appeal an adverse judgment because of an appeal bond requirement. Nor has any appeal bond even caused a major cigarette company any significant economic hardship. Most notably, in the multi-billion dollar judgments against the cigarette companies in the Florida *Engle* class action lawsuit and the Illinois *Miles* light/low-tar class action lawsuit ruling, the losing cigarette manufacturers were able to meet the appeal bond requirements under traditional appeal bond rules. In the *Miles* case, for example, Philip Morris threatened that the initial \$12 million appeal bond would force the company to declare bankruptcy. After some adjustments to that requirement, under existing traditional appeal bond rules, however, Philip Morris posted the required bond, still amounting to billions of dollars, and continued its appeal (which is still pending).
- The large cigarette companies have massive financial resources and can easily secure appeal bonds in the billions of dollars. For example, when Philip Morris USA was the losing defendant in the Illinois *Miles* case, its net revenues were \$18.87 billion and its net operating income (roughly equal to its profit) was \$5.01 billion; and its parent company, Altria Group, Inc. had total assets of \$87.5 billion, net revenues of \$80.4 billion, operating income of \$16.6 billion, and an established available line of credit of \$15.0 billion.²

- An appeal bond cap of \$100 million or any similar amount drastically reduces the protections of winning plaintiffs in multi-billion dollar lawsuits and allows losing defendants that are big cigarette companies (or other large corporations) to secure appeal bonds by paying only pennies on the dollar. A \$100 million appeal bond in the *Miles* case would have amounted to less than one percent of the monetary judgment against Philip Morris; and Philip Morris would have been able to post the \$100 appeal bond directly by using only about two percent of its operating income for just a single year.³
- An appeal bond cap of \$100 million or any similar fixed amount provides absolutely no protection at all for losing defendants in the vast majority of lawsuits where the awarded damages amount is much less than \$100 million. Yet losing individual and small business defendants have much less access to financial resources or credit, even on a proportional basis, than the big cigarette companies (or other large corporate defendants) and are much more likely than the big cigarette companies to have trouble posting appeal bonds equal to the full judgment amounts.
- Even if a state wanted to make its existing appeal bond requirements easier on defendants, the just-described flaws with fixed appeal bond caps show that they do not and cannot improve the situation. But there are more flexible alternatives available that would strike a much more equitable and constructive balance between the need both to protect winning plaintiffs and to treat losing defendants fairly. For example:
 - > The courts could simply be provided with the authority to reduce the amount of an appeal bond below the monetary judgment amount (plus costs and interest) -- but only to the extent necessary to make the appeal bond reasonably available to the defendant. In determining whether an appeal bond or security in a certain amount is reasonably available, the court could be directed to consider such factors as whether it is possible for the defendant to post the bond or other security without severe economic hardship such as being forced into bankruptcy or out of business, whether the interests of the prevailing parties can be adequately protected if the appeal bond amount is lowered, and whether the defendant has any non-frivolous grounds for making an appeal.⁴
 - > If a more formal appeal bond cap is desired, creating a flexible cap based on some percentage of a defendant's total assets or average net revenues over the past several years (perhaps 50%) would make more sense than some inequitable fixed amount.
 - > However it is done, the court could also be given clear authority to issue related orders when establishing an appeal bond requirement to protect against any possible efforts by defendants to divert, hide, or waste their assets during the appeal process.

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¹ See, e.g., *State Farm v. Campbell*, 000 U.S. 01-1289, April 7, 2003; Foundation for Taxpayer and Consumer Rights, *The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights*, July 2000; R.J. Reynolds, Class Actions, <http://www.rjrt.com/TI/TILitigationLitSumClassAction.asp>, downloaded March 8, 2004; *Pennzoil v. Texaco*, 481 U.S. 1, 1987 [overruling the 2nd Circuit on jurisdictional grounds but leaving the 2nd Circuit's ruling on appeal bonds and due process intact].

² Altria Group, Inc., *2002 Annual Report*. For more on cigarette company assets, see their filings with the U.S. Securities and Exchange Commission, <http://www.sec.gov/edgar/searchedgar/webusers.htm>; and the TFK factsheet *Philip Morris's Ability to Post Lawsuit Appeal Bonds*, <http://tobaccofreekids.org/research/factsheets/pdf/0228.pdf>.

³ At that time, Philip Morris's operating income was \$5.01 billion, and its net revenues were \$18.87 billion. Altria Group, Inc., *2002 Annual Report*.

⁴ Judicial discretion with authority to make rulings to protect against defendants' diversion or waste of assets is at the core of the changes to the rules governing appeal bonds made by the Supreme Court Rules Committee in Illinois (home of the *Miles* lawsuit), <http://www.state.il.us/court/SupremeCourt/Rules/MRAmend061504.htm#305>.