

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB FTC 09-01 Tobacco Settlement Agreements

SPONSOR(S): Finance & Tax Council; Bogdanoff

TIED BILLS: IDEN./SIM. BILLS:

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Finance & Tax Council		Rubottom	Langston
1)				
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

In civil litigation, a successful plaintiff may execute (initiate collection) on a judgment when it is entered by the trial court. An appeal by the defendant does not restrict the right of the plaintiff to collect, unless the court enters a stay of execution pending the appeal. When the state is the defendant, a stay pending appeal is automatic as a matter of law. Under Florida court rules, a stay is also to be automatically granted if the defendant posts a bond or other surety in an amount equal to the judgment plus two years' interest at a rate set by law. Based upon equitable principles, a court may alter the surety required for continuance of the stay. In addition, statutory caps on appeals bonds have been enacted to regulate punitive damages, large cases, and class actions.

In 2003, a \$100,000,000 appeal bond cap was enacted for class action cases in which certain tobacco companies were the defendants appealing the judgment. These companies are the companies who in 1997 settled certain claims prosecuted by the State of Florida and now make annual payments to the state.

PCB FTC 09-01 expands that \$100,000,000 cap on supersedeas bonds, or other sureties posted by appellants as provided in s. 569.23, applicable to cases against the settling tobacco manufacturers. The bill would apply a \$100,000,000 cap to a group of cases arising out of a formerly certified class action. It apportions the cap between settling manufacturers based primarily on their pro rata share of settlement payments. The security posted by each settling manufacturer would secure the separate judgment liability of that manufacturer pending appeal.

The PCB would allow bond to be posted with the clerk of the Supreme Court and apply to affected cases tried in any circuit court. It would authorize the clerk of the Supreme Court to receive any net investment income on cash deposited.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **1997 tobacco settlement background**

In February 1995, the State of Florida sued a number of tobacco manufacturers and other defendants, asserting various claims for monetary and injunctive relief on behalf of the state of Florida. In March 1997, the State settled all of its claims against the Liggett Tobacco Company. In August, 1997, the "Big Four" tobacco companies: Phillip Morris, Reynolds Tobacco, B&W American Brands, and Lorillard entered into a landmark settlement with the State for all past, present, and future claims by the State including reimbursement of Medicaid expenses, fraud, RICO and punitive damages. (See, *State v. American Tobacco Co. et al.*, Case # 95-1466AH, Fla. 15<sup>th</sup> Cir. Ct.)

Florida was expected to receive approximately \$12 billion over the first 25 years of the agreement. All other states have also settled similar claims against the tobacco manufacturers. Florida now receives 5.5 percent of the national settlement payments in perpetuity. The total amounts are affected by national market share of the settling manufacturers and is apportioned among the manufacturers based on their individual market shares. The settlement obligations are unsecured obligations of the manufacturers, making the state, therefore, an unsecured creditor of each settling manufacturer.

One factor affecting the stability of the tobacco settlement payments is the cost of dozens of individual lawsuits and class action suits. On March 21, 2003, an Illinois circuit court judge ordered Philip Morris Inc. to put up a \$12 billion bond to file an appeal in a class-action tobacco lawsuit. See *Price, et al v. Philip Morris Incorporated*, Cause No. 00-L-112, (Circuit Court, 3<sup>rd</sup> Judicial Circuit, Madison County, Illinois).<sup>1</sup> Subsequent to the court's ruling, a great deal of publicity and speculation was generated that Philip Morris would not be financially able to post the bond, would possibly default on its' April 15<sup>th</sup> installment of the MSA<sup>2</sup> and might seek bankruptcy protection. Phillip Morris filed a *Request for Reduction of Bond and Stay of Enforcement of the Judgment*. In that proceeding, a *Brief of Amici Curiae* was filed by the chief law enforcement officers of 37 States and territories of the United States

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<sup>1</sup>At issue in the Illinois class-action lawsuit was whether the defendant had violated the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act in its' manufacturing, promoting, marketing, distributing and selling Marlboro *Lights* and Cambridge *Lights*. The court found in favor of the plaintiffs and awarded the sum of \$7.1005 billion in compensatory damages. In addition, the court ordered the defendant to pay punitive damages in the amount of \$3 billion to the State of Illinois. Enforcement of the judgment could be stayed only if an appeal bond was presented and approved pursuant to Illinois court rule in the amount of \$12 billion.

<sup>2</sup> Under the MSA, Philip Morris is obligated to make annual payments each April 15<sup>th</sup>. The payment due on April 15, 2003 to the states under the MSA was for \$2.6 billion.

and the Commonwealth of Puerto Rico and the National Conference of State Legislatures (“NCSL”)<sup>3</sup>. *Amici* urging the court to exercise its discretion to reduce the appeal bond so as not to interfere with the states’ vital interests.<sup>4</sup> The court in *Price* entered an order substantially reducing the appeal bond and no tobacco settlement payments were missed.

### **2003 Tobacco Supersedeas Bond Cap**

As a result of these events and the potential for their repetition in Florida, in order to balance the competing interests between judgment creditors, the right to appeal unusually large judgments often including punitive damages, and the stability of the settlement payments to the State of Florida during the pendency of other major cases, the Legislature enacted s. 569.23, F.S. setting a cap on supersedeas bonds of \$100,000,000 in any one civil action involving one of the settling manufacturers.

Since that time a major class action has been decertified by the Supreme Court of Florida for some purposes, leaving approximately 8,000 separate lawsuits in which damages may be awarded. Prior to decertification, the class action suit would have been covered by the appeal bond cap in s. 569.23. Without the protection of the cap, the settling manufacturers could eventually be required to post supersedeas bonds in up to 8,000 cases that could cumulatively total in the billions of dollars.

### **Appeal Bonds**

Rule 9.310 of the Florida Rules of Appellate Procedure, governing stays pending review, provides:

**(a) Application.** Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

**(b) Exceptions.**

(1) *Money Judgments.* If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment<sup>5</sup> plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond satisfying the above criteria.

(2) *Public Bodies; Public Officers.* The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

**(c) Bond.**

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<sup>3</sup> NCSL is a bipartisan organization that serves the legislators and staff of the legislatures as an advocate for the interests of the states, providing research, technical assistance and information exchange among policymakers on important state issues. In the amicus brief, NCSL’s interest in the case is stated as “protecting state finances during the most difficult state budget period in fifty years.” See page 2 of the Brief of Amici Curiae, Claim No. 00-L-112 (Circuit Court, 3<sup>rd</sup> Judicial Circuit, Madison County, Illinois).

<sup>4</sup> Generally, the interest of the states expressed in the amicus brief was that of preserving the value of the tobacco settlements and preventing the lawsuit from prejudicing those settlements. Specifically, the points raised in defense of a reduction in the appeal bond in the amicus brief can be outlined as follows:(1) failure by Philip Morris to make its \$2.6 billion payment on April 15, 2003 would irreparably injure vital public health and safety interests of the states in that more than 50% of MSA payments are being used to support public health and education programs and (2) any substantial delay in the receipt of Philip Morris’s payment would severely prejudice the states in that most states operate on a fiscal year or biennium budget that ends on June 30 and that state expenditure authorization is limited to the amount of funds actually received by the state during that fiscal period. In sum, if the states did not receive their payments as scheduled, they would be forced to cut programs or reappropriate funds from other priorities to cover the revenue shortfall.

<sup>5</sup> The year 2009 interest rate on judgments, set by the Chief Financial Officer pursuant to s. 55.03, F.S., is 8.0% per annum or .0002192 per day. See <http://www.fldfs.com/aadir/interest.htm>.

(1) *Defined.* A good and sufficient bond is a bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office. The lower tribunal shall have continuing jurisdiction to determine the actual sufficiency of any such bond.

(2) *Conditions.* The conditions of a bond shall include a condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed; and may include such other conditions as may be required by the lower tribunal.

**(d) Judgment Against a Surety.** A surety on a bond conditioning a stay submits to the jurisdiction of the lower tribunal and the court. The liability of the surety on such bond may be enforced by the lower tribunal or the court, after motion and notice, without the necessity of an independent action.

**(e) Duration.** A stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

**(f) Review.** Review of orders entered by lower tribunals under this rule shall be by the court on motion.

In addition to s. 569.23, F.S., other exceptions presently in general law include s.45.045, F.S., (a 2006 law setting an appeal bond cap of \$50,000,000 per case) and s. 768.733, F.S., (a 2000 law affecting class actions, setting a cap of the lesser of \$100,000,000 or 10% of the defendant's net worth to stay execution pending appeal on punitive damages awards). As specified in the rule, the automatic stay is effective during appellate review in Florida courts. Separate federal proceedings are available to appellants who seek discretionary review in the U.S. Supreme Court.

### **Administration of supersedeas bonds**

Ordinarily, appeals bonds are posted with the court in the county where the trial court judgment was entered. A court clerk is entitled to fees for examining bond certificates issued by surety companies, and also for receiving registry deposits, which would occur if a party deposited cash as a supersedeas bond. Court clerks appear to have discretion ordinarily to deposit such cash receipts with their local depository institution, commingled with county funds, unless in a particular case a court enters specific escrow orders.

Appeal court clerks including the Clerk of the Supreme Court have power under s. 28.231 to charge the same fees as clerks of the circuit courts when their duties require the provision of similar services. The Supreme Court has broad administrative powers over the court system and would appear to have sufficient authority to enter administrative orders for the efficient administration of a class of cases such as those resulting from the decertification of the tobacco plaintiffs mentioned above. The potential administrative burden of receiving, managing and paying or refunding as many as 8,000 separate supersedeas bonds appears to be significant.

The Chief Financial Officer manages many liquid escrow accounts for various agencies and political subdivisions. The CFO appears to have unquestionable authority to manage any funds under the control of public officials and charges a minimal management fee for such services. Currently, demand escrow deposits under management of the CFO earn between 1 and 3% interest.

### **Proposed Changes**

PCB FTC 09-01 expands the \$100,000,000 cap on supersedeas bonds in s. 569.23, F.S., to apply to a large group of cases arising from the decertification of a class in a former class action suit against tobacco manufacturers. In effect, the same bond would be in place as would have been if the class was still in one class action case. However, the PCB divides the bond equitably between the affected manufacturers, making each separately responsible for a maximum bond of \$5 million or a percentage of \$100 million representing the manufacturer's share of tobacco settlement payments to Florida in 2008. (It is expected that one manufacturer would be under the \$5 million dollar cap and three would

post \$100 million between them once the judgments on appeal against each exceeded their individual share of the cap.)

As long as the minimum bond required of an appellant is in place, execution on the judgment in each affected case would be stayed pending appeal. The stay would extend to any period of discretionary review by the U.S. Supreme Court. The bill provides all bonds to be posted with the clerk of the Supreme Court acting as a central registry serving the approximately 7,000 cases believed to be affected. It allows for the Supreme Court to direct how the clerk would certify such bonding to the 67 Circuit Court clerks. It directs the clerk of the Supreme Court to utilize the services of the Chief Financial Officer to safeguard and manage any cash deposits and allows the clerk to receive any net investment income on such funds as a fee.

The bill provides that each affected judgment creditor will be a proportionate beneficiary of any security posted under the new provision by an appellant seeking review of their individual judgment. It provides a 30-day window for a judgment to be paid after it becomes final (meaning all appeals have been exhausted) before the bond may be utilized. This is expected to reduce administration substantially as long as the tobacco defendants can pay their debts. In the event a judgment is not timely paid, the stay of execution in every case affecting that manufacturer would end, and the security posted by that appellant would be available to pay judgments affected.

#### B. SECTION DIRECTORY:

Section 1 amends s. 569.23 as described above.

Section 2 makes the bill effective upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

Staff estimates that the bill could generate approximately \$1,000,000 in annual fees for the clerk of the Supreme Court for a number of years. The bill directs such fees to be deposited into the State Courts Revenue Trust Fund to be used as specified by law.

##### 2. Expenditures:

Staff estimates that the bill would impose some administrative costs on the office of the clerk of the Supreme Court but would save a multiple of such costs in the Circuit Courts.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

If passed, the bill would avoid small fees of the Circuit Court clerks for examining and certifying surety bonds that might be posted, and/or significant fees that may be charged when cash bonds are provided.

##### 2. Expenditures:

The bill would save significant expenses arising out of the administration of as many as 7,000 separate supersedeas bonds that may be posted otherwise in the affected cases.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill would likely save the tobacco companies some surety premiums and administrative expenses related to the 7,000 separate bonds that might otherwise be posted in the affected cases. The bill should not affect the recovery of private plaintiffs in any way as the tobacco defendants are expected to be capable of paying all judgments against them.

D. FISCAL COMMENTS:

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

2. Other:

The substantive/procedural boundary between Supreme Court rulemaking authority under Article V and the Legislature's plenary substantive authority may be relevant to this bill. Important public policy concerns relate to the continued liquidity of the tobacco manufacturers. The State of Florida is a major unsecured creditor with respect to those companies. The bill attempts to balance the public and private interests involved. The bill also makes choices about the utilization of judicial and court clerk resources. All these interests and choices appear to reflect classic legislative concerns. The bill also clearly affects, to some degree, the substantive interests of both plaintiffs and defendants in the affected cases. The bill allows for the Supreme Court to regulate the procedures of the Court's clerk as the clerk undertakes the novel role assigned.

B. RULE-MAKING AUTHORITY:

No new authority is granted in the bill. The Supreme Court has constitutional authority to adopt rules to govern the administration of justice and judicial procedure in Florida, including inherent authority to direct the conduct of the Court's clerk.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**