HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1867 Tobacco Settlement Agreement
SPONSOR(S): Altman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2826

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

In August of 1997, the "Big Four" tobacco companies (Phillip Morris, R.J. Reynolds, Brown and Williamson, 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.

This bill provides that, in civil actions involving signatories to the tobacco settlement, their successors or "affiliates," the total appeal bond for all defendants "in such litigation" may not exceed $100 million.

This bill further provides that, after notice and hearing, a court may enter necessary orders to protect plaintiffs from a defendant who has been proven by a preponderance of the evidence to be purposefully dissipating assets outside the ordinary course of business to avoid paying the judgment. Such orders may include an order to post an appeal bond up to the full amount of the judgment.

This bill may have an uncertain fiscal impact on state government. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[x]	No[]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

This bill caps some appeal bonds at a level below 100% of a judgment, which could arguably reduce personal responsibility on the part of appellants.

B. EFFECT OF PROPOSED CHANGES:

Background: The Tobacco Settlement

In February 1995, the State of Florida sued a number of tobacco manufacturers asserting various claims for monetary and injunctive relief on behalf of the state of Florida.[1] 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, R.J. Reynolds, Brown and Williamson, 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. At the time of the settlement, these cigarette producers collectively held 93% of the tobacco market share in the U.S. The remaining 7% market share was held by various smaller producers who were not named in the state's suit as defendants and, therefore, were not part of the settlement agreement.

Under the terms of the settlement agreement, as subsequently amended by a Stipulation Amendment, there are non-monetary and monetary sanctions imposed on the tobacco manufacturers. The non-monetary provisions involve restrictions or limitations on billboard and transit advertisements, merchandise promotions, product placement, and lobbying, relating to all tobacco products.

The amount of the tobacco settlement payments is based on a consideration of volume of U.S. cigarette sales, market share, net operating profits, consumer price indices, and other factors with respect to each year payment is made. Any adjustment to those payments is based on a formula set forth in an appendix to the settlement agreement and involves a ratio of volume of U.S. cigarette sales as existed in 1997 and volume of sales in the applicable year. If the market share of these manufacturers declines, their payments to Florida under the settlement agreement will, likewise, decline.

Subsequent to Florida's settlement, the Big Four and some other smaller tobacco producers[2] settled with 46 states and five U.S. territories.[3] This Master Settlement Agreement provided over $200 billion to the participating states over a 25-year period and contained terms similar to those of the Florida agreement which tie their payments, in part, to the company's market share sales.

---

[1] *See State v. American Tobacco Co.*, No. 95-1466AH, 1996 WL 788371 (Fla. 15th Cir. Ct. 1996). Brown and Williamson is the corporate successor of American Tobacco by merger. In addition to the Big Four, U.S. Tobacco Company is also a signatory to the agreement.

[2] According to industry publications, 37 of the smaller manufacturers are now participating.

[3] Like Florida, the states of Texas, Minnesota and Mississippi also entered into earlier individual settlement agreements.

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 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.**
> (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.

Proposed Changes

This bill provides that, in civil actions involving signatories to the tobacco settlement, their successors or “affiliates,” the total appeal bond for all defendants “in such litigation” may not exceed $100 million.

This bill further provides that, after notice and hearing, a court may enter necessary orders to protect plaintiffs from a defendant who has been proven by a preponderance of the evidence to be purposefully dissipating assets outside the ordinary course of business to avoid paying the judgment. Such orders may include an order to post an appeal bond up to the full amount of the judgment.

C. SECTION DIRECTORY:

Section 1. Creates s. 569.23, F.S., capping appeal bonds for tobacco settlement signatories and providing an exception.

Section 2. Provides an effective date of July 1, 2003, and clarifying that this shall apply to all cases pending on or filed on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill may have an uncertain fiscal impact on the state. It may be negative, in that it could provide time and opportunity for a losing appellant to spirit assets out of the state's reach; conversely, it might be positive because it could prevent settlement signatories from being forced into bankruptcy (which might result in the state's payments being diminished, postponed or ended).

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Under this bill, some appellants who otherwise would have to post larger appeal bonds will only have to post them in the amount of $100 million, or a fraction thereof; in some cases, this could be a very significant discount from the full amount that would be required by current law. Indeed, due to cash-flow concerns, it is possible that this bill would prevent some appellants from filing for bankruptcy.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Separation of Powers

Article II, section 3 of the Florida Constitution provides: "No person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Article V, section 2(a) of the state constitution further provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts." Because this bill caps appeal bonds in some cases, it may raise constitutional concerns under these provisions.

The Legislature is responsible for enacting substantive law, while the Supreme Court is responsible for promulgating rules of practice and procedure. The Legislature has the constitutional authority to repeal a procedural rule by a two-thirds vote;[4] however, it has no authority to enact a law relating to practice and procedure. The question of whether a law is substantive or procedural is one that occurs frequently, but is nevertheless difficult to determine.

In *Benyard v. Wainwright*,[5] the Supreme Court stated that substantive law prescribes rights and duties, whereas procedural law concerns the means and method to apply and enforce those rights. Florida courts protect their procedural rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.[6] In 1991, the Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.[7]

The First District Court of Appeal, in *Johnson v. State*,[8] held that a statute requiring presentence reports to be conducted in certain cases was unconstitutional because it conflicted with a rule of procedure; therefore, it infringed upon the rulemaking power of the Supreme Court. The dispositive issue in determining whether the law was substantive or procedural seemed to be that the Court had already preempted the Legislature from acting in this area by the Court's prior adoption of a rule governing presentence reports.[9]

In analyzing whether this section encroaches upon the Supreme Court's rulemaking authority, a court may look at whether the Supreme Court has preempted the Legislature from acting in a particular area, as the *Johnson* court did. A court could find that the Legislature has, rather, exercised substantive lawmaking authority.

However, even if a court finds that some of this bill's provisions are procedural, it could decide to uphold the bill anyway by deferring, as it sometimes does, to the Legislature's expertise in implementing procedural rules in which it has a policy interest.[10] The fact that Rule 9.310 of the Florida Rules of Appellate Procedure specifically uses the phrase "[e]xcept as provided by general law" may weigh strongly in favor of this view.[11]

---

[4] *See* Art. V, s. 2(a), Fla. Const.
[5] 322 So.2d 473 (Fla. 1975).
[6] *See In re Connors*, 332 So.2d 336 (Fla. 1976).
[7] *See Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991). *See also Knealing v. Puelo*, 674 So.2d 593 (Fla. 1996); *Ash v. Singletary*, 687 So.2d 968 (Fla. 1st DCA 1997); *Military Park Fire Control Tax District v. De Marois*, 407 So.2d 1020 (Fla. 4th DCA 1981) (all striking down attempts to specify timing and sequence of court procedures).
[8] 308 So.2d 127 (Fla. 1st DCA 1975).
[9] *See id.* at 128.
[10] *See, e.g.*, *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998) (upholding a 30-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding as a policy matter in which the Legislature had expertise).
[11] *See, e.g.*, *St. Mary's Hospital, Inc., v. Phillipe*, 769 So.2d 961 (Fla. 2000) (holding that this phrase allowed the Legislature to limit the ability of a defendant in a medical malpractice arbitration to seek a stay pending review).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The phrase “such litigation” in Subsection 1 of this bill’s new s. 569.23, F.S., may be unclear. It is not entirely apparent to what this phrase refers, and thus it might be argued that this bill’s cap on appeal bonds actually applies to the tobacco settlement signatories in any or every type of litigation, even if unrelated to the subject of the settlement.

The term “affiliate of a signatory” in Subsection 1 may also be unclear, or overly broad. This bill provides no guidance on exactly how close a relationship an individual or entity must have with a signatory before becoming an “affiliate.”

Subsection 2 of this bill’s new statutory section refers to “plaintiff” and “defendant,” rather than to appellant and appellee; this may be an undue presumption about who would be suing whom, and about which party is likely to prevail at the trial level. Regardless of who is the prevailing party, this language appears to grant plaintiffs more rights on appeal than defendants.

Because this bill specifies that the total bond for all defendants may not exceed $100 million, it is unclear how this would be allocated among co-defendants. This aggregate cap could thus be an incentive for defendants to attempt to implead as many co-defendants as possible.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A