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	16 Y, 0 N	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.[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 settlement agreement, as subsequently amended by a Stipulation of Amendment,[2] 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. Subsequently, statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds.[3] As authorized by the Act, the Comptroller (now Chief Financial Officer) is responsible for the enforcement of the Tobacco Settlement Receipts ("payments") from the depository institution to which the tobacco companies submit their payments in Electronic Fund Transfer form.

According to the August 2001 Revenue Estimating Conference, Florida is to receive $12.1 billion over the first 25 years of the agreement. The state will also receive an additional $1.5 billion over the 5-year period ending in 2003 as a result of a most favored nation clause in the settlement agreement as amended. The amounts of these tobacco settlement receipts (or payments) are based on a consideration of volume of U.S. cigarette sales, share of market, net operating profits (undefined in the agreement), consumer price indices, and other factors as to each year payment is made. Any adjustment to those payments are based on a formula set forth in an appendix to the settlement

[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] Florida negotiated what essentially amounts to a "Most Favored Nation Clause" in the Stipulation of Amendment—which provided the state with additional monies for a period of time—after Minnesota settled with the defendants on terms more favorable than Florida's.

[3] *See* ch. 98-63, L.O.F.

agreement and involve a ratio of volume of U.S. cigarette sales as existed in 1997 and volume of such sales in the applicable year. Apart from other first year payments, Florida is to receive 5.5 percent of the unadjusted amounts in perpetuity.

Subsequent to Florida's settlement, the Big Four and some other smaller tobacco producers[4] settled with 46 states, the District of Columbia, the Commonwealth of Puerto Rico and four U.S. territories.[5] This Master Settlement Agreement ("MSA") provided states with funding to prevent smoking and control tobacco sales. The agreement required tobacco companies to take down all billboard advertising and advertising in sports arenas, to stop using cartoon characters to sell cigarettes and to make available to the public specified documentation. The tobacco companies also agreed to not market or promote their products to young people. The total unadjusted cost of the state settlements ranges between $212 billion to $246 billion over the first 25 years, subject to numerous adjustments ranging from inflation to fluctuations in cigarette consumption and market share.

What the tobacco companies and the settling jurisdictions have difficulty in factoring is the estimated cost of dozens of individual lawsuits and class action suits. On March 21, 2003, an Illinois trial court ordered Phillip Morris Inc. to put up a $12 billion bond to file an appeal in a class-action tobacco lawsuit.[6] Subsequent to the court's ruling, a great deal of publicity and speculation was generated that Phillip Morris would not be financially able to post the bond, that it would possibly default on its April 15th installment of the MSA,[7] and that it might seek bankruptcy protection.[8] Phillip Morris filed a Request for Reduction of Bond and Stay of Enforcement of the Judgment, in which a Brief of *Amici Curiae* signed by the chief law enforcement officers of 37 jurisdictions, and by the National Conference of State Legislatures ("NCSL"),[9] was filed urging the court to exercise its discretion to reduce the appeal bond so as not to interfere with their vital interests.[10] On April 14, 2003, the court entered an order effectively reducing the appeal bond by slightly under half to $6.8 billion. Phillip Morris accepted the new appeal bond and confirmed it would also meet its April 15th MSA payment deadline.

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

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

[6] *See Price v. Phillip Morris, Inc.*, Cause No. 00-L-112 (Ill. 3d Cir. Ct. 2003). At issue in this 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 and allegedly declaring them safer for consumers than "regular" cigarettes. 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 could be stayed only if an appeal bond was presented and approved pursuant to Illinois court rule in the amount of $12 billion.

[7] Under the MSA, Phillip Morris is obligated to make annual payments each April 15th. The payment due to the MSA signatory jurisdictions on April 15, 2003 was for $2.6 billion.

[8] *See, e.g.*, Associated Press, "Attorneys general ask to lower Phillip Morris bond," BRADENTON HERALD, April 8, 2003; Ameet Sachdev, "Phillip Morris appeals ruling: Seeks to subtract punitive damages of $3 billion," CHICAGO TRIBUNE, April 5, 2003; Editorial, "Legal trouble for tobacco," BOSTON HERALD, April 5, 2003; Sun-Times Springfield Bureau, "Thompson: Cap tobacco bond ; Says $12 bil. appeal cost can hurt state," CHICAGO SUN-TIMES, March 26, 2003.

[9] 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."

[10] Generally, the interest of the states and other jurisdictions 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 Phillip Morris to make its $2.6 billion payment on April 15, 2003, would irreparably injure vital public health and safety interests of the states and other jurisdictions party to the MSA, 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 Phillip Morris's payment would severely prejudice them, in that most of them operate on a fiscal year or biennium budget that ends on June 30 and their expenditure authorization is limited to the amount of funds actually received by the state during that fiscal period. In sum, if they 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.

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.

The current interest rate on judgments, set by the Chief Financial Officer pursuant to s. 55.03, F.S., and Rule 3A-25, Fla. Admin. Code, is 6% per annum or .0001644 per day.[11]

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.

[11] *See* http://www.dbf.state.fl.us/interest.html. This rate is calculated by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate.

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;[12] 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*,[13] 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.[14] 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.[15]

The First District Court of Appeal, in *Johnson v. State*,[16] 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.[17]

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.[18] Indeed, the courts have sometimes invalidated statutes and then immediately proceeded to adopt them as court rules.[19] The fact that

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[12] *See* Art. V, s. 2(a), Fla. Const.
[13] 322 So.2d 473 (Fla. 1975).
[14] *See In re Connors*, 332 So.2d 336 (Fla. 1976).
[15] *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).
[16] 308 So.2d 127 (Fla. 1st DCA 1975).
[17] *See id.* at 128.
[18] *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).
[19] *See, e.g.*, *TGI Friday's Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995). Similar actions appear to be authorized by the procedures for adopting emergency court rules. *See* FLA. R. JUD. ADMIN. 2.130(a).

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.[20]

Due Process

The retroactive application of this bill's provisions to all cases pending on July 1, 2003 may implicate due process considerations under the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution. There is a two-prong query for determining whether a statute should be retroactively applied, i.e., whether there is clear legislative intent to apply the statute retroactively, and whether it is constitutionally permissible.[21] In light of this, it is unclear how a court would construe this bill's effective date.

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

On April 22, 2003, the House Committee on Judiciary reported this bill favorably without amendment.

[20] *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).
[21] *See Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999).